No. 97

In the Supreme Court of the United States

OCTOBER TERM, 1960

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, AND RACHEL M. BRAWNER, PETITIONERS

v.

NEIL H. MCELROY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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OPINIONS BELOW

The order of the district court (R. 132) is not reported. The opinion of the court of appeals *en banc* (Pet. App. 1a–42a; R. 144–181) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1960 (R. 182). The petition for a writ of certiorari was filed on May 24, 1960, and was granted on October 10, 1960 (R. 200). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

[1] The opinion of the division of the court of appeals (R. 134–139), which was supplanted by the *en banc* decision, will not be reported.

QUESTIONS PRESENTED

1. Whether the commanding officer of a military installation has authority to prohibit, summarily and without a hearing, entrance of an employee of a private contractor into the installation.

2. Whether the exercise of such authority in the circumstances of this case violated the Fifth Amendment to the Constitution.

STATUTES, REGULATIONS, AND MANUALS INVOLVED

The pertinent portions of the statutes, regulations, and manuals involved are set out in the Appendix, *infra*, pp. 89–100.

STATEMENT

Petitioner Rachel M. Brawner was employed as a short-order cook by the M & M Restaurants, Inc., a private company (hereafter called the "Concessionaire") at a cafeteria on the premises of the United States Naval Gun Factory[1] in Washington, D.C., which is engaged in the development of weapons systems of a highly classified nature (R. 4, 39, 90, 93, 107). The property on which the cafeteria was situated is owned by the United States (R. 105) and is under the command of the Superintendent of the Naval Gun Factory (R. 105; Exhibits C and D, R. 108–112). Access to the Gun Factory is restricted to authorized personnel and is controlled by military guards at all points of access. An identification badge is issued by the Security Officer of the Gun Factory

[1] Although the name of the Naval Gun Factory officially was changed to Naval Weapons Plant on July 1, 1959, during the course of this litigation, it will be referred to as the "Gun Factory" in this brief.

to persons authorized to enter the premises and must be displayed by those seeking entry (R. 7, 90, 94).

The cafeteria was operated by the Concessionaire under a contract with the Board of Governors of the United States Naval Gun Factory Cafeterias[*] (R. 5–6). Under a previous contract between the Board and the Concessionaire, which was in effect when petitioner Brawner first began working at the Gun Factory, the Superintendent of the Factory had the power "to cancel, revoke or withdraw" the employment of any of the Concessionaire's employees "for any cause or reason deemed sufficient by the Superintendent or his representative, in the exercise of discretion, without the necessity for any showing of cause" (see Appendix *infra*, pp. 99–100). The Concessionaire was then required to terminate the employment of such person, his identification badge was to be taken up, and he was not to be allowed in the Gun Factory thereafter. The contract in effect when petitioner Brawner's badge was withdrawn stated that the Concessionaire agreed that it would not continue to engage personnel who "fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity" (R. 5–6). The personnel employed by the Concessionaire were members of the petitioner union, Cafeteria and Restaurant

[*] The Board of Governors is composed of seven civilians who are employed by the Gun Factory and are appointed by the Superintendent of the Gun Factory (R. 6). The contract was therefore in effect between the Concessionaire and the Gun Factory.

Workers Union, Local 473, AFL–CIO, with whom the Concessionaire had a collective bargaining agreement containing a provision that no worker should be discharged "without good and sufficient cause" and also providing for arbitration proceedings to resolve any disputes arising under the contract (R. 18–20).

When petitioner Brawner began working for the Concessionaire, she was issued an identification badge which permitted her to enter and leave the confines of the Gun Factory. On November 15, 1956, at the direction of respondent Lieutenant Commander Williams, the Security Officer of the Gun Factory, petitioner Brawner was required to relinquish her identification badge because of failure to meet the security requirements of the installation (R. 98–99). This action was subsequently upheld by respondent Admiral Tyree, Superintendent of the Gun Factory[4] (R. 59–60). As the basis of his action, Admiral Tyree cited the provision in the contract, entered into between the naval officials and the Concessionaire, that the Concessionaire could employ only personnel who met the security requirements for admittance into the Factory as determined by the Security Officer (Exhibit N, R. 32–33). As a consequence of the withdrawal of her identification badge, petitioner Brawner has not since been permitted access to the premises where the cafeteria is located.

Shortly after the termination of Mrs. Brawner's access to the Gun Factory, Denver E. McKaye, presi-

[4] Navy Department General Order 29[illegible] (November 28, 1945) designates the Superintendent as the Commanding Officer of the Gun Factory (R. 108–109).

dent of the Concessionaire, notified the Business Agent of the Union that his firm would employ petitioner Brawner at another location where his firm operated a food service establishment, *i.e.*, the Skylark Motel in Springfield, Virginia (a suburb of Washington) (R. 131). Mr. Palmer, the Union Business Agent, told Mr. McKaye that the location of this alternate employment was unsatisfactory and therefore refused the offer for petitioner Brawner (R. 131).

The Union took the position that the Concessionaire had discharged petitioner Brawner "without good and sufficient cause" and thereby had violated the collective bargaining agreement between the Concessionaire and the Union (R. 8–9, 20–23, 45–48, 91). Accordingly, the Union demanded arbitration proceedings under the contract. An arbitration hearing was held (R. 34–70), and on August 6, 1957, the arbitration panel held that petitioner Brawner was not discharged by the Concessionaire and that her real grievance was against the government which had denied access to her place of employment (R. 71, 75–76).

On September 6, 1957, petitioners instituted suit in the District Court for the District of Columbia seeking (1) to require respondents[5] to furnish petitioner

[5] Besides Superintendent Tyree and Security Officer Williams the other respondents were Neil H. McElroy, the former Secretary of Defense, and Thomas S. Gates, the present Secretary of Defense (formerly Secretary of the Navy). The Concessionaire was named as a defendant in the complaint, but the district court dismissed the action as to it and the court of appeals affirmed. Petitioners have not sought review of these rulings, and the Concessionaire is not a respondent in this Court (see Pet. Br. 20, note 10).

Brawner with an identification badge authorizing her entry upon the premises of the Naval Gun Factory and approval of her reemployment there by the Concessionaire; (2) to require the Concessionaire to reinstate her with all seniority rights, and to pay all loss of salary since November 15, 1956, with interest at 6% per annum; (3) to hold respondents and the Concessionaire jointly and severally liable as individuals for loss of pay since November 15, 1956, with interest at 6% per annum; and (4) to set aside the arbitration award of August 6, 1957 (R. 2, 16–17). After a hearing, the district court denied the plaintiffs' motion for summary judgment, granted the defendants' cross-motion for summary judgment, and dismissed the complaint as to all the defendants (R. 132). A three-judge division of the court of appeals, in a divided decision, affirmed the judgment in favor of the Concessionaire, but reversed the judgment as to respondents here and remanded the case (R. 134–139). On rehearing *en banc*, the full court of appeals held the decision of the three-judge panel erroneous and affirmed the judgment of the district court (R. 144–181).[4]

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[4] After the decision of the court of appeals was entered, respondent Gates was substituted for respondent McElroy in the capacity of Secretary of Defense. Respondents thereupon moved on May 3, 1960, in the court of appeals for dismissal of the case as to Mr. McElroy in his individual capacity. This motion was granted on June 2, 1960, but because of defective service respondents filed a motion in the court of appeals to reconsider and reaffirm the court's order dismissing as to Mr. McElroy in his individual capacity. Petitioners then cross-moved to vacate the order of June 2, suggesting lack of jurisdiction since a petition for certiorari had been filed in this

The contract under which the Concessionaire operated the cafeteria where petitioner Brawner was employed expired on January 31, 1958, and the Concessionaire no longer operates any cafeteria on the premises of the Gun Factory (R. 107). The new concessionaire, Implant Foods, Inc., has entered into a collective bargaining contract with the Union whereby Implant has agreed to employ petitioner Brawner with full rights if this litigation is decided in her favor (Pet. App. 40a).

SUMMARY OF ARGUMENT

I

Military commanders have the authority summarily to exclude employees of private contractors from their bases. *Greene* v. *McElroy*, 360 U.S. 474, does not apply to this case.

A. *Greene* v. *McElroy* held that "explicit authorization" was required for certain procedures of the Industrial Security Program—specifically, the revocation of security clearances of persons employed by private contractors on private property, without confrontation and cross-examination of hostile witnesses. This

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Court. The court of appeals reaffirmed its order of June 2 on June 30, 1960.

The two orders of the court of appeals were issued after the petition for a writ of certiorari was filed on May 24, 1960, but before the writ was granted on October 10. Therefore, the dismissal of the case as to Mr. McElroy occurred while the case was still within the jurisdiction of the court of appeals. See *Magnum Co.* v. *Coty*, 262 U.S. 159; *Waskey* v. *Hammer*, 179 Fed. 273 (C.A. 9). Since petitioners have not filed a petition for a writ of certiorari from the June 30 order, the dismissal of Mr. McElroy is now final.

unusually strict requirement of authorization by Congress or the President was founded in *Greene* on three basic propositions, none of which is present in this case.

First, this Court repeatedly relied in *Greene* on the uncontradicted evidence that Greene had lost his employment as a result of the loss of his security clearance and that his future employment opportunities had been drastically impaired. In contrast, in the present posture of this case, petitioner Brawner is in the position of a new employee seeking a badge to take employment for the first time. Her old employer no longer has the concession at the Gun Factory and she has been deprived of only the promise of a new job with a new employer by the refusal of respondents to give her a badge.

Even if the case is considered in its posture before the district court, Mrs. Brawner did not lose her employment with her particular employer, let alone all employment in her chosen occupation. Since she was offered a similar position with her same employer not too many miles away, Mrs. Brawner's claim is in reality based on a transfer of positions within the same company, not on full loss of employment. Moreover, Mrs. Brawner was in an occupation having large numbers of employment opportunities, few of which require government clearance. Unlike Greene, she was not deprived of employment in her chosen occupation.

Turning from Mrs. Brawner in particular to the problem as a whole, there is substantially less likelihood of a serious impact on employment opportunities

through loss of access to military bases. The number of civilians employed by private contractors on military bases, while large, is a negligible proportion both of total employment and of employment in the particular occupations involved. The large majority of such persons would not lose their jobs at all since their employers do much of their business off the base and, if they are discharged, they are generally in non-specialized occupations as to which most employment is unconnected with the government.

The second premise of the *Greene* decision is that clearance under the Industrial Security Program was based on a fact determination reached through elaborate hearing and appeal procedures. But no procedures have been established as to control of access to military bases; rather, this decision has always been made summarily by military commanders on the basis of whatever information they could obtain.

The third critical distinction between this case and *Greene* is that there a serious constitutional issue was involved and, for this reason, the Court refused to assume that the administrative action was authorized. As we have said, however, Mrs. Brawner did not have her employment relationship severed, nor did she lose her employment opportunities. But even if the withdrawal of her security badge had left her in a position comparable to the petitioner in *Greene,* the constitutional issue here would still be substantially less serious. The long history of summary control over civilian access to military bases makes clear that private persons have no constitutional right to a hearing before access to a military base is denied.

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B. If ordinary standards for measuring delegation of authority are applied, authorization of the summary procedure involved here is clear. But even if the clearer authorization required by *Greene* must be shown, we submit that this criterion has been satisfied.

1. Congress has provided that the Department of the Navy shall be administered by the Secretary of the Navy who has complete authority over its property and has the power to issue regulations which, when approved by the President, have the force of law. In regulations approved and signed by the President, the Secretary provided that commanding officers, such as the Superintendent of the Gun Factory, should impose restrictions on visitors to their commands needed to safeguard classified matter in their custody and that "tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer."

In addition, the Regulations direct the Chief of Naval Operations to issue supplementary security manuals. The Security Manual for Classified Matter provides that "the commanding officer of the activity being visited has full discretion as to whether the visit shall be permitted." The term "visitor" is defined as "any person who is not attached to or employed by the command or staff using that station as headquarters," including "[p]ersonnel of private facilities under contract to the Department of Defense." An employee of a private concessionaire comes within this definition.

2. The summary power of the commanding officer over access to his activity which is clearly authorized

by the statutes, regulations, and manuals is confirmed by the actual practice of military commanders for over a hundred years. This history of summary power by military commanders is so clear that, until this litigation, it appears that it had never been seriously challenged, at least in court. Any arbitrary use of the commander's power has been appealable only to, and reviewable by, superior military and executive authority. In fact, it is well settled that the executive lacks power, without specific authorization by Congress, to create any right to use a military base which is not revocable at will. Accordingly, the burden is on the petitioners to show that Congress has authorized or required the executive to surrender its inherent power to revoke at will any license to enter military bases; the burden is not on the executive to show specific authorization for the power to revoke.

II

If, as we have said, Mrs. Brawner did not lose her job but was merely transferred, and did not lose her employment opportunities, there is no substantial constitutional question. Assuming, however, *arguendo*, that she was more seriously affected, the basic constitutional question is whether the interest in being permitted access to a military base, and thus being able to work, is "liberty" or "property" entitled to the procedural protections of the Fifth Amendment. That question depends not only upon the substantiality of the injury resulting from governmental action, but also upon the nature of the interest affected.

A. In controlling access to military bases, the Government acts in a proprietary capacity—*i.e.*, in the management and protection of property committed to its custody for governmental use. Private persons are allowed access to such property solely for the convenience of the government, and they acquire no interest that can be described as more than a permissive use. It is not an interest that has traditionally been accorded legal protection.

1. Action taken by the government in the control of its own property is very different in nature from the exercise of a legislative or regulatory power affecting the legal rights and duties of private persons at large. In the cases involving private employment, relied upon by petitioners, the governmental interference was of the latter type, imposing a legal disability upon the person affected (*e.g.*, by denial of a license required to engage in an occupation, *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9)). Even assuming that the practical consequences to Mrs. Brawner of the government's denial of access to a military base might be the same in some instances as a legal bar to her employment in the cafeteria or restaurant industry, the distinction between the nature of the interests involved is deeply rooted in our law. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

2. Governmental action may, however, be subject to certain kinds of constitutional restraints even though the interest affected does not appear to be otherwise legally-protected. Although there is no "right" to government employment, this Court has observed that "Congress may not 'enact a regulation providing that

no Republican, Jew or Negro shall be appointed to federal office.'" *United Public Workers* v. *Mitchell,* 330 U.S. 75, 100. See also *Wieman* v. *Updegraff,* 344 U.S. 183, and *Slochower* v. *Board of Education,* 350 U.S. 551, holding unconstitutional dismissals from state employment on the basis of an arbitrary statutory standard. The underlying basis of these cases, we submit, is that there is an affirmative right granted by the Constitution for one to be free of certain kinds of invidious discrimination by the state, regardless of the nature of the interest affected—a concept, although part of "substantive" due process, closely akin to that of the equal protection clause. The same is not true, however, of "procedural" due process; procedure is not an end in itself and some substantive interest must first be recognized before procedural due process can be claimed. Thus, there remains the problem of defining the kinds of interests qualifying as "life, liberty, or property," and of determining whether Mrs. Brawner's interest falls in that class.

B. Recognition of Mrs. Brawner's interest in obtaining access to the Gun Factory as "property" or "liberty" entitled to constitutional protections would inevitably require a departure from the traditional reluctance of the courts, because of considerations implicit in the constitutional separation of powers, to interfere with the internal affairs of the government. See *Decatur* v. *Paulding,* 14 Pet. 497, 516. One such area of noninterference has been in the award of contracts. Another is the removal of government employees, the history of which was summarized in *Bailey* v. *Richardson,* 182 F. 2d 46, 57 (C.A.D.C.),

affirmed by an equally-divided Court, 341 U.S. 918: "Never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service." And the summary power of the executive to control persons desiring to come on or use government property is even more clear. Whether exercised by Congress or the executive, the government has absolute control over property of the United States and, under this power, may exclude persons who have been using such property even when this causes pecuniary damage.

What is true of the executive's power to make contracts, to dismiss government employees, and to decide who may come on or use ordinary government property is true with redoubled force of the power to say which private persons have access to military bases, for here we are dealing with the most vital interests of the nation. In no area are the constitutional responsibilities of the executive branch any greater or any clearer; if there are to remain any powers of the executive free of procedural restraint, they must include the absolute control of access to military institutions. And in no area is the history of summary action of the executive—which has not been judicially challenged until now—more clear.

C. If Mrs. Brawner's interest in obtaining access to the Gun Factory is not itself a right entitled to constitutional protection, it is not made so by the alleged consequential injury to reputation. The governmental action taken was the minimum necessary to withdraw the badge from her. The government has never published the action taken; and there was no gratuitous

labelling nor any characterization attributed to Mrs. Brawner beyond that inherent in the action itself. Moreover, the withdrawal of the badge was for "security reasons" which include such characteristics as being accident-prone, garrulous, or dishonest. But even insofar as "security reasons" might conceivably relate to information of disloyalty, the withdrawal of Mrs. Brawner's badge is not a determination of fact but at most implies only a doubt of her reliability. In short, since the government's denial of access to the base was otherwise lawful and privileged as an exercise of its right to control its own property, it was not made unlawful by the possible consequential damage to reputation. And in any event, Mrs. Brawner's right to the relief she seeks—restoration of access to the Gun Factory—must be predicated upon a right to that access as such. If the only protected interest is the interest in reputation, that relief would be inappropriate.

ARGUMENT

INTRODUCTION

Petitioners seek a judicial order requiring respondent government officials to return Mrs. Brawner's identification badge and thereby allow her access to the Naval Gun Factory.[1] The basic conten-

[1] Petitioners' additional claim for relief against respondent government officers (which petitioners do not argue in their brief)—that they be held jointly and severally liable for loss of pay—is plainly frivolous. Their action, whether or not authorized, was clearly taken in the performance of their official duties. It was therefore absolutely privileged from civil liability. See, *e.g.*, *Barr* v. *Matteo*, 360 U.S. 564; *Howard* v. *Lyons*, 360 U.S. 593; *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949. The other relief sought by

tion is that the commanding officer of a military base lacks authority summarily to prohibit the entrance of employees of a private contractor onto the base. Petitioners further argue that, even if Congress or the President gave commanding officers such authority, this action would be unconstitutional. Petitioners are thus claiming that there is a constitutional right of private citizens to enter a military base unless charges are brought against them justifying their exclusion and unless a hearing is afforded in which the charge can be rebutted. Stated in the words of the court of appeals, the "narrow" issue before the Court is "the nature and extent of the power of a naval officer in command of a naval installation to control the ingress and egress of civilians to and from the premises. * * * The case does not involve debarment from a chosen occupation. It is not a discharge case. The case does not involve any personnel Security Program, with its concomitant regulations" (R. 147–148).

We submit that the petitioners' contentions are fundamentally inconsistent with the course of our history as a nation. Military officers have been summarily controlling entrance of non-military men to their commands since the beginning of this country's armed forces. This power has been assumed and exercised without challenge prior to this litigation. Indeed, so far as we have been able to ascertain, no person prior to this case has ever brought a judicial proceeding claiming any right to enter a military base.

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petitioners in their complaint (see *supra*, pp. 5–6) is directed to petitioner Brawner's employer, which is not a party in this Court.

This unbroken and long-standing history, based as it is on the underlying need of the military to have full control over military posts, far outweighs any *a priori* deductions now sought to be derived from distantly analogous situations and principles. But, in any event, as we will show, the authority of commanding officers summarily to control entrance to military bases is established not merely by history, but by executive orders and statute, and is consistent with the Constitution.

I

MILITARY COMMANDERS HAVE THE AUTHORITY SUMMARILY TO EXCLUDE EMPLOYEES OF PRIVATE CONTRACTORS FROM THEIR BASES

Petitioners contend (Pet. Br. 27–66) that the decision of the court of appeals upholding the action of the military commander is in conflict with *Greene* v. *McElroy*, 360 U.S. 474, in which this Court held that "in the absence of explicit authorization from either the President or Congress the respondents [in that case] were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508). Petitioners reason that Mrs. Brawner was likewise deprived of her job with a private employer without confrontation and cross-examination—without even any hearing at all—and that such a procedure was not explicitly authorized. We submit, however, that the *Greene* case is controlled by factors which are not present in the instant case. Moreover, even if the *Greene* principle is thought applicable,

the relevant statutes and regulations, coupled with the long history of plenary control by military commanders over access to military installations through summary orders, constitute the clear authorization which would be required.

A. *GREENE* v. *McELROY* IS INAPPLICABLE TO THIS CASE; EXPLICIT AUTHORIZATION IS NOT NECESSARY FOR COMMANDERS SUMMARILY TO CONTROL ACCESS TO MILITARY BASES

In *Greene* v. *McElroy, supra,* the Court considered the authority underlying certain procedures of the Industrial Security Program—the revocation of security clearances of persons employed by private contractors on private property without any provision for confrontation and cross-examination of hostile witnesses. While making clear that these procedures would be held to be authorized if one were to apply ordinary standards of delegation of authority (360 U.S. at 506), the Court held that "explicit authorization" was required for non-confrontation procedures, in view of the nature of the interests affected (360 U.S. at 507, 508). In our view, the imposition in *Greene* of this strict rule as to authorization was founded on three basic propositions, none of which is present in this case.

1. First, in *Greene,* the evidence was uncontradicted that the employee had been trained in the specialized field of aeronautical engineering and had spent all his professional life in this field; that he had lost his employment as a result of the revocation of his security clearance since his employer had no work not requiring such a clearance; and that he was unable to obtain a new position in the aeronautics field. Thus,

he was forced to leave a job paying $18,000 per year and to accept a position paying $4,700. In the light of these facts, the Court stated that "the issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions * * *" in proceedings in which the opportunity for confrontation and cross-examination is not afforded. 360 U.S. at 493. Similarly, the opinion later describes the situation before the Court as "Governmental action [which] seriously injures an individual * * *" (*id.* at 496), "an industrial security program which can operate to injure individuals substantially by denying to them the opportunity to follow chosen private professions * * *" (*id.* at 500), "security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions * * *" (*id.* at 502), "programs under which persons may be seriously restrained in their employment opportunities * * *" (*id.* at 502–503), "substantial restraints on employment opportunities of numerous persons * * *" (*id.* at 506), and a program by which "a person may be deprived of the right to follow his chosen profession" (*id.* at 507). And, in concluding, the Court reiterated that "the petitioner's work opportunities have been severely limited * * *" and that "respondents were not empowered to deprive petitioner of his job * * *" (*id.* at 508). In sum, the Court relied heavily on the important interest of employees such as Greene in earning a satisfactory livelihood.

The situation in Mrs. Brawner's case is quite different. In the first place, the main relief sought by petitioners was the restoration of Mrs. Brawner's badge so that she could be employed by M & M at the Gun Factory. But, since the M & M company no longer has a contract to operate a cafeteria at the Gun Factory, the present posture of the case is that the return of Mrs. Brawner's badge could not possibly restore her job with M & M.[8] While petitioner Union has a collective bargaining agreement with the new concessionaire to hire Mrs. Brawner if her badge is returned, she is in effect now in the position of a person seeking access to the base in order to assume *new* employment. In other words, as the case comes before this Court, Mrs. Brawner, far from seeking access to the base in order to protect an old job, is attempting to secure new employment with a new employer by having her badge restored.[9]

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[8] The present relationship of the M & M company to the Gun Factory is important because the restoration of Mrs. Brawner's badge is necessarily prospective.

[9] Recent events also suggest that this case, as it relates to restoration of Mrs. Brawner's badge, may possibly become moot, or of greatly diminished importance insofar as Mrs. Brawner is concerned. The Defense Department has announced that the Gun Factory will no longer operate as an industrial plant (although it will remain a naval installation), thereby causing a gradual reduction in the civilians employed from 5970 during the summer of 1960 to 4309 at present (January 1, 1961) to probably 2300 in January 1962. The number of workers in the cafeteria will be reduced proportionally as employees in the Gun Factory are discharged, so that by January 1962 over one quarter of the cafeteria workers will no longer be needed. It is therefor possible, but not certain, that Mrs. Brawner would lose her position at the Gun Factory within the next year or two even if a badge were now given her.

Even if the case is considered in its posture before the district court, Mrs. Brawner cannot claim that her relationship with her employer was severed, let alone that she was denied all employment in her chosen occupation. She was told by the Concessionaire that she could no longer work at the particular cafeteria in the Gun Factory, but she was also offered employment in another cafeteria operated by her employer not too many miles away. The denial of access to Mrs. Brawner meant, in reality, a transfer of positions within the same company and not the loss of her employment.[10] Her refusal to accept the transfer because of inconvenience does not measure up to the drastic interference with employment, and employment opportunities, involved in *Greene*.[11] More-

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[10] Compare the concurring opinion of Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 181:

> The security problem, however, relates only to those sensitive areas where secrets are or may be available * * *. The department heads must have leeway in handling their personnel problems in these sensitive areas. * * * One can be transferred from those areas even where there is no more than a suspicion as to his loyalty.

Here, petitioner Brawner was clearly in an area where secrets might be available even though she had no right of access to such information. See also the concurring opinion of Mr. Justice Douglas in *Peters* v. *Hobby*, 349 U.S. 331, 352, which implies that a government employee could be transferred so that he could not see classified information, in circumstances where the information could not be used to discharge him.

[11] Petitioner claims (Pet. Br. 93–94) that it would have taken her an hour and a half each way to reach the new job from her home. Many persons travel an hour or more to and from their jobs. And, at most, the new job would require a change of residence, in contrast to the loss of employment in an entire occupation as in *Greene*.

over, it is significant that Mrs. Brawner, unlike *Greene,* was in an occupation having many positions, few of which involve government clearance of any kind. Thus, she was not deprived generally of employment opportunities in her chosen occupation, as the Court found Greene to have been. In short, petitioner Brawner's situation, as the court of appeals succinctly described it, was (R. 159–160):

> She was not discharged. She was not debarred from her chosen occupation. She was offered a similar job by her same employer, and she refused. There are scores of places open to short-order cooks here and elsewhere. The essence of her claim is that the site of her employment cannot be changed unless charges are made against her and she has a full hearing with witnesses, etc.

Turning from Mrs. Brawner in particular to the problem as a whole, it is evident that there is substantially less likelihood of a serious impact on employment opportunities through loss of access to military installations than through denial of a security clearance for access to classified information. The number of civilians employed on military bases by private contractors, while large, is a negligible proportion both of total employment and of employment in the particular occupations involved. The large majority of such persons are in non-specialized service occupations—delivery men of all sorts (milk, laundry, fuel, military supplies, etc.), repairmen, salesmen, cafeteria workers, and the like—as to which most employment within the United States is totally unconnected with the government. Thus, even when

denial of access to a military base actually results in an employee's loss of his job, it is unlikely to result in barring him, as in *Greene*, from his occupation as a whole. And many such persons, like Mrs. Brawner, would not lose their jobs at all because their employer has substantial business, and therefore jobs, outside the military base.[12]

2. The second fundamental premise of the *Greene* decision is that, under the Industrial Security Program, clearance is denied only on the basis of a fact determination reached through elaborate hearing and appeal procedures. The Court stated that it is a general principle of American jurisprudence that "where governmental action seriously injures an individual, *and the reasonableness of the action depends on fact findings*, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue" (emphasis added) (360 U.S. at 496). The Court also stated that "petitioner's work opportunities have been severely limited on the basis of a *fact determination* rendered after a hearing which failed to comport with our traditional ideas of fair procedure" (emphasis added) (*id.* at 508). The Court concluded that the requirement of fact findings assumes that the usual incidents and protections of American law will be

[12] Contrary to petitioners' suggestion (Pet. Br. 90), the distinction between this case and *Greene* discussed above does not discriminate against persons with "menial" jobs. The kind of job is unimportant in itself; what is important is whether the persons affected by the government action will normally lose their present employment and future employment opportunities.

afforded in reaching these findings, unless there is explicit provision to the contrary.

In contrast to the Industrial Security Program involved in *Greene*, no procedures have been established for determining access to military installations through fact determinations. Rather, now, as throughout our history (see *infra*, pp. 37–55), military officers exclude persons from their commands without any procedure, simply on the basis of whatever information they have or can obtain. Since these decisions have not been based on "fact findings" in any real sense, there is no ground for assuming here—as in *Greene*—that the normal procedural concomitants of factual findings must be accorded the individual adversely affected, unless the President or Congress have explicitly authorized a different procedure.

3. The third critical distinction between this case and *Greene* is that, in our view, no constitutional issue of the magnitude of that in *Greene* is involved here. It is clear that the ruling in *Greene* rests in considerable measure on the conclusion that the "administrative action has raised serious constitutional problems" and that for this reason the Court will not lightly assume that the action was authorized. 360 U.S. at 507; see also *id.* at 492, 496–497, 508. However, as we indicate below (pp. 57–58), these constitutional problems arise almost entirely from the fact that the petitioner in *Greene* lost both his present employment and his employment opportunities—circumstances which do not exist in this case. But, even if the withdrawal of Mrs. Brawner's badge had in fact left her in a comparable position to the petitioner in *Greene*,

the constitutional issue raised in the instant case would nevertheless be far less substantial. The long and unbroken history of summary control over civilian access to military bases shows, we submit, that petitioner Brawner had no constitutional right to a hearing before access was denied (see *infra*, pp. 77–78). Civilians have been, and can validly be, excluded from military posts without any hearing or trial—and for a large and varied number of reasons. That is a critical difference.[13]

B. EVEN IF EXPLICIT AUTHORIZATION IS REQUIRED, THIS STANDARD HAS BEEN MET

We have shown that the basic factors upon which the Court relied in *Greene* v. *McElroy* are not involved in this case. There is, therefore, no basis for imposing the strict standard of *Greene* for finding authorization by the President or Congress of the procedures followed in denying petitioner Brawner access to the Gun Factory. Under ordinary standards for measuring delegation of authority, authorization for summary action is clear. But, even if the decision in *Greene* does apply and clear authorization must be shown, we submit that this criterion has been satisfied.

1. *The Constitution, statutes, regulations, and manuals.*—(*a*) The Constitution gives Congress broad powers to legislate concerning the Navy in general and

[13] Even if a serious constitutional issue were involved here, we do not believe that this fact alone, in the absence of at least the other two underlying premises of the *Greene* decision we have discussed, would be enough to bring this case within the requirements of "explicit authorization" provided in *Greene*.

naval bases in particular. Article I, Section 8, grants authority to Congress to "provide and maintain a Navy" (clause 13), to "make Rules for the Government and Regulation of the land and naval Forces" (clause 14), to legislate concerning military installations (clause 17), and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *" (clause 18). Similarly, Article II, Section 2, by making the President Commander in Chief of the armed forces, gives him broad powers over the Navy and its bases.

Congress has provided that the Secretary of the Navy "shall administer the Department of the Navy" and shall have complete authority and charge of all property of the Department (10 U.S.C. 5031(c), Appendix, *infra*, p. 91). As part of this authority, the Secretary of the Navy has been given the power to issue regulations for "the custody, use, preservation of the * * * property" of the Department (5 U.S.C. 22, *infra*, p. 89; 10 U.S.C. 6011, *infra*, p. 91). These Regulations, like "Army Regulations, when sanctioned by the President, have the force of law * * *." *United States* v. *Eliason*, 16 Pet. 291, 301–302. See also, *e.g.*, *United States* v. *Freeman*, 44 U.S. 556, 566; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 484.

Regulations promulgated by the Secretary, and specifically approved by the President,[14] state that "[t]he

[14] The cover sheet of the Regulations was signed by President Truman following the word "approved" (see *infra*, p. 92). Navy regulations are required to be so approved. 10 U.S.C. 6011, *infra*, p. 91.

responsibility of the commanding officer for his command is absolute," that he must "[e]xert every effort to maintain his command in a state of maximum effectiveness for war service," and that he is "responsible for the control of visitors to activities of the Department of the Navy and shall comply with the relevant provisions of the U.S. Navy Security Manual for Classified Matter and other pertinent directives." Navy Regulations (1948), Articles 0701, 0704, 0733, *infra*, p. 93. Furthermore, "[c]ommanding officers shall take such measures and impose any restrictions on visitors as necessary to safeguard the classified matter under their jurisdiction" (Article 0733, *infra*, p. 93).

More specifically, the Navy Regulations provide that "[i]n general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer" (Article 0734, *infra*, pp. 93–94). One of the purposes for which commanding officers may admit such persons is "[t]o furnish services and supplies which are necessary and are not otherwise, or are insufficiently available to the personnel of the command" (*ibid.*). Since Mrs. Brawner was the agent of the tradesman who was furnishing meals at the Gun Factory, she clearly comes within the scope of Article 0734 as a visitor. These regulations prohibit the admission of persons in the class of Mrs. Brawner except for certain stated purposes and only when authorized by the commanding officer. Thus, the regulations, in themselves, constitute full authority for denying Mrs. Brawner access to the Gun Factory unless the Superintendent

considers her admission necessary or desirable for one of the permitted purposes.

In addition, the Navy Regulations direct the Chief of Naval Operations to "supplement these regulations with detailed instructions to insure the proper control of classified matter. Such instructions shall include the United States Navy Security Manual for Classified Matter * * * and such others as may from time to time be issued—all such publications shall have the full force and effect of these Regulations" (Article 1502, *infra*, p. 94). The Navy Security Manual for Classified Matter, which was issued by the Chief of Naval Operations on October 2, 1954,[15] provided that "[o]fficers in a command status shall be responsible for the security control of visitors within the limits of their jurisdiction," "shall promulgate such additional directives as are necessary for the control of visitors within their respective commands," and shall be responsible, with regard to visits "by persons who will not have access to classified matter," "for the decisions and conditions under which such visits are permitted" (Sections 1401, 1404 (R. 116, 117–118)). And then, even more comprehensively, the Manual states that "[t]he commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted" even when the visit has been approved by a higher command (Section 1409 (R. 119)).

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[15] This manual was superseded, subsequent to the denial of access to petitioner Brawner, by Navy Security Manual for Classified Information (March 10, 1958). The provisions of the earlier manual, upon which we rely, are substantially unchanged. See Navy Security Manual for Classified Information, Sections 1401–1404, 1407–1408, *infra*, pp. 95–98.

A "visitor to a naval shore establishment" is defined in the Manual as "any person who is not attached to or employed by the command or staff using that station as headquarters" (Section 1402 (R. 116)). This broad definition is further divided into categories which include United States citizens who are "[p]ersonnel of private facilities under contract to the Department of Defense" (Section 1403 (R. 116–117)). Petitioner Brawner comes within this definition of visitors since she is neither attached to nor employed by the naval command of the Gun Factory but rather is one of the personnel of a private facility. In fact, petitioners admit that Mrs. Brawner was not employed by the naval command but say that she "would seem to be 'attached' to" it (Pet. Br. 49). This suggestion, however, is not supported by any authority and is contrary to ordinary military usage. The Naval Civilian Personnel Instruction 790.3–8f, issued on September 6, 1957, states under the general heading of Food Services:

> The services operated by concessionaires are classed as private enterprises; they acquire none of the status of a government instrumentality and their employees have the same legal status as do employees of any private employer.

Petitioners, however, claim (Pet. Br. 47–49) that Section 1411 of the Manual, *infra*, pp. 94–95, excludes Mrs. Brawner from the definition of a "visitor" since it requires that visitors be escorted, which Mrs. Brawner never was. But Section 1411 requires only that visitors with access to classified information—which peti-

tioner did not have—be escorted.[16] First, this is the clear implication of statement in Section 1411 that "'[e]scorts' are responsible to commanding officers to assure that the visitor has access to only that information for which he has been authorized." Second, Section 1407 of the Navy Security Manual for Classified Information, *infra*, p. 97, which is the successor to Section 1411 of the Manual for Classified Matter, explicitly states, with no apparent intent to change the meaning, that escorts for visitors are used only to protect classified materials.[17] And lastly, Section 1404 of the Manual for Classified Matter (R. 117), states that visitors making unclassified visits need escorts if they are American citizens who represent a foreign military service, government, or private interest or if they are foreign nationals. Such a requirement would hardly be necessary, if, as petitioners claim, all visitors need escorts.[17a]

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[16] Of course, visitors having security clearances under the Industrial Security Program—which is applicable to persons having access to security information, who are employed by private contractors on military bases as well as off—do not need to be escorted.

[17] In addition, Section 1407 of the new Manual makes escorts discretionary.

[17a] Petitioners also claim (Pet. Br. 50–53) that Section 1501 of Chapter 15, *infra*, p. 95, of the Manual provides that security investigations of persons employed by private contractors are conducted under the Industrial Security Program and this program is inapplicable to petitioner Brawner since it covers only persons with access to classified matter. We agree and, indeed, emphasize (see *infra*, pp. 34–37) that the Industrial Security Program is inapplicable to Mrs. Brawner in terms and because both the title to Chapter 15 and Section 1501 itself make clear that Section 1501 applies only to persons "requiring

The broad power of commanding officers contained in the Security Manual for Classified Matter, to exclude persons from their commands at their discretion, is confirmed by the Navy Physical Security Manual, which was issued by the Chief of Naval Operations on April 14, 1956. This Manual states that "[t]he Commanding Officer is responsible for the security of all property and installations within his command. He prescribes the security measures to be adopted, and coordinates when necessary the measures adopted by subordinates, but he alone remains responsible for the overall security of his command" (Section 0154, *infra*, p. 98). The commanding officer is granted authority to delegate "the administration and operational aspects of security" to a Security Officer (Section 0156, *infra*, pp. 98–99). Thus, Commander Williams had the authority, as Security Officer of the Gun Factory, to withdraw petitioner Brawner's identification badge—a decision which was upheld by the Superintendent of the base.

Again, petitioners contend (Pet. Br. 53–56) that Mrs. Brawner does not come within the definition of "visitor" in Sections 0540 and 0542 of the Physical Security Manual, *infra*, pp. 100–101. These sections define a "visitor" as a person including employees of a private contractor who have infrequent or temporary access to security areas, and Mrs. Brawner was never authorized to have access to security areas (R. 99). But the definition explicitly applies only "[f]or the

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access to classified matter." However, petitioners' conclusion that persons in Mrs. Brawner's position are therefore "to be let alone" does not follow.

purpose of this manual" (Section 0540) and therefore does not apply to the Manual for Classified Matter which has its own definition.

Moreover, the definition of "visitor" in the Physical Security Manual specifically includes employees of private contractors. It demonstrates that the term "visitor" does not itself imply that persons, like Mrs. Brawner, who are employed by private contractors are not included. Insofar as the definition of visitor in that Manual includes only persons with access to security areas and information, its explicit language to this effect supports our contention that the very different definition in the Manual for Classified Matter (see *supra,* p. 29; R. 116–117) includes employees of private contractors who have no such access.

(*b*) We have described above (*supra,* pp. 25–32) the direct authority of naval officers to exclude civilians, in their discretion, from naval bases—as conveyed by the Constitution, statutes, regulations, and manuals. In addition, Congress has impliedly recognized the existence of this authority in two criminal statutes. 18 U.S.C. 1382, *infra,* p. 92, makes it unlawful to enter or be found within any military base "after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof * * *." The Army Judge Advocate General's Office has on at least two occasions construed this statute as implying the power of commanding officers to exclude persons from military bases (see *infra,* pp. 44, 51). The Internal Security Act of 1950, 50 U.S.C. 797, makes unlawful the violation of any "regulation or order" issued "by any military commander designated by the Secretary

of Defense * * * for the protection or security of" naval bases relating to "the ingress thereto or egress or removal of persons therefrom." On August 20, 1954, the Secretary of Defense promulgated Department of Defense Directive No. 5200.8 (R. 119–122), designating commanding officers of all naval installations as authorized to promulgate regulations for the protection or security of military property as contemplated in the Internal Security Act.

(c) Petitioners argue (Pet. Br. 58–65) that the administrative materials relied upon above—the Navy Regulations and Manuals—were not published in the Federal Register as required by Section 3(a) of the Administrative Procedure Act, 5 U.S.C. 1002(a). They claim, therefore, that respondents are precluded from relying on these materials.

While Section 3(a) provides for the publication of "descriptions of [every agency's] central and field organizations including delegations by the agency of final authority," it begins by explicitly stating that the requirement of publication is not required for "any matter relating solely to the internal management of an agency." The regulations and manuals cited in this brief to support respondents' authority relate entirely to the power to exclude persons from the confines of military bases. This power does not relate to the general public, but instead on its face concerns the internal management of the Navy and particularly of the Naval Gun Factory.[18]

[18] There would be little reason for publication since the regulations and manuals do not provide a procedure to be followed, and of which advantage can be taken by the public. On the

Furthermore, Mrs. Brawner cannot claim that she had no notice of her vulnerability to summary removal of her badge. She knew that her job was on a military installation and that clearance by the Security Officer, as evidenced by issuance to her of an identification badge, was required in order for her to reach her place of employment. At the time of her employment she had been required to file an "Application to Security Officer for Pass" (R. 66–67, 99). And if there was any responsibility to give notice of the specific limitation in the contract with the Gun Factory—by which the Concessionaire agreed not to employ persons who did not meet security requirements—it would rest on Mrs. Brawner's employer, the Concessionaire.

(*d*) Petitioners also base an elaborate argument on procedures used in other circumstances. They insist that, if Mrs. Brawner had had access to security information (Pet. Br. 31–41) (whether employed by a private contractor on or off a military base), or if she had been a government employee (Pet. Br. 42–46), the government would have been required to give her notice and some kind of hearing under applicable statutes and regulations. But, of course, Mrs. Brawner is in neither of these categories and cannot take advantage of whatever procedures are afforded persons differently situated. And, contrary to petitioners' assertion, those provisions lend no support to the curious proposition that persons not covered by

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contrary, we have emphasized that naval commanders have summary power and no procedures for persons affected are given.

these procedures were meant to be left entirely free from denial of access to the base, *i.e.*, "are to be let alone" (Pet. Br. 41). Both the Industrial Security Program and the various protections given to government employees were introduced to provide formal procedures in certain instances where, previously, governmental action had been taken summarily. As we will show (see *infra*, pp. 37–55), governmental action as to access to military bases has always been summary. The only proper inference which can be drawn from the fact that Congress or the President have provided for procedural protections for government employees and employees of private contractors with access to security information, but not for others like Mrs. Brawner, is that the summary power of military officers to control access to their commands has been left intact.

To the claim that it is illogical for procedures to be afforded to employees of private contractors working on military bases who have access to classified information but not to such employees without access, it is a complete answer that Congress or the President have provided for procedural protections in certain situations and not in others. Unless the Constitution requires these procedures (see *infra*, pp. 57–88), they cannot be extended to circumstances to which they have not been applied by the legislative or rule-making authorities. In any event, employees without access to classified information are not given less procedural protection, with respect to access to the military bases, than those with such access. The regulations and manuals give commanding officers full dis-

cretion in admitting visitors to military bases whether they will have access to classified information or not. The only difference is that visitors with access to classified matter need authorization from the Chief of Naval Operations under special procedures. Naval Security Manual for Classified Matter, Section 1404 (R. 117–118). Separate from such authorization, however, employees of private contractors with access to classified matters also need clearance under the Industrial Security Program (Section 1501, *infra*, p. 75). If a commanding officer of an installation wishes to exclude such an employee, he can do so summarily. But the employee may continue to have access, off the base, to classified information possessed by his private employer unless his security clearance is removed under the procedures of the Industrial Security Program (as presumably would be done).

Moreover, even if petitioners are correct that employees of private contractors working on military bases with access to classified material have greater protection, in that they are entitled to hearings before they can be denied entrance to the base, this is not illogical. First, most persons who are employed on military bases by private employers do not have access to classified information. Instead, they are generally in such non-specialized service occupations as laundrymen, milk truck drivers, and cafeteria workers (see *supra*, p. 22). Thus, the present system of regulations which affords procedural protections only to certain civilian employees of private contractors leaves the military substantially in its traditional position of being able summarily to control entrance to military

bases—control which has been deemed throughout our history essential for efficient military operations. If petitioners are right, the grant of procedural protections to employees of private contractors with access to security information, whether working on a military base or in a private factory, would grant all *such* employees the same procedures rather than making the applicable protections depend on the circumstance that the individual was employed off rather than on a military base.

Second, as we have also shown above (pp. 21–23), most persons employed in positions without access to classified information are not so drastically affected by denial of access to military bases and therefore have less need for procedural protections. Many such persons, such as laundry or milk truck drivers, do not spend all or even most of their working time on the base; or, such as petitioner Brawner, they work for employers who can transfer them to positions not requiring access to military bases; or, like repairmen and many construction workers, they will lose only temporary employment by not being allowed to enter a base. Thus, many, if not most, persons who have non-security jobs with private employers, and who may be denied access to military bases, will not even lose their present employment. And most of them who do would appear to have non-specialized employment and would therefore have less difficulty in gaining substantially similar employment elsewhere.

2. *The history of control of access to military bases.*—The statutes, regulations, and manuals discussed above (pp. 25–33) give complete authority to the

commanding officer to decide security matters in general and, more particularly, give him full power to select or screen those persons who shall have access to the installation. This authorization is confirmed by the actual practice of military commanders throughout our history; they have regularly exercised authority to admit or exclude civilians selectively, as they deemed appropriate at the time.[19] Indeed, it appears that until this litigation it had never been seriously suggested, at least in court, that military commanders lacked authority summarily to exclude persons seeking to enter their commands. And the very contract between the Gun Factory and the Concessionaire, when Mrs. Brawner first came to work at the Factory, provided that the Superintendent could cancel the employment and withdraw the badge "for any cause or reason deemed sufficient by the Superintendent * * * in the exercise of discretion without the necessity for any showing of cause" (see *infra*, pp. 101–102).

The first explicit formulation (in printed form) of the power of military officers to decide at their discretion who will be allowed to enter their commands is apparently that given by Attorney General Butler in 1837 (3 Op. Atty. Gen. 268). The opinion concerns generally the power of the Superintendent of West Point to exclude civilians who were resident at the Military Academy or who wished to visit the hotel, public wharf, or post office at the Academy. More

[19] On the other hand, in *Greene*, the Court noted that, prior to World War II, only "sporadic efforts were made to control the clearance of persons who worked in private establishments which manufactured materials for national defense." 360 U.S. at 493.

specifically, the issue before the Attorney General was the Superintendent's power to exclude one Avery who lived in a house on the Academy grounds and who had in fact been physically excluded by order of the Superintendent. But before deciding this issue, Attorney General Butler stated that the position of the Superintendent was that civilians have no right to enter the Academy limits (*id.* at 269):

> [H]e has always regarded the citizens resident within the public limits—such as the sutler, keeper of the commons, tailor, shoemaker, artificers, etc., even though they own houses on the public grounds, or occupy buildings belonging to the United States * * *—as *tenants at will*, and liable to be removed whenever, in the opinion of the superintendent, the interests of the academy require it. "This," he observes, "has been the practice since I have been in command; and such, I am told, was the usage under the administration of my predecessors." [Emphasis in original.]

It is thus clear that long before 1837 military commanders had assumed that they had the power, and had actually exercised it, to exclude at will persons who earned their living by working on military bases.

Attorney General Butler confirmed virtually in entirety the power which the Superintendents of West Point had exercised. He stated that "no person can be entitled, as a matter of right, to enter within the limits of this post, unless he be authorized to do so by the laws of the United States, or by some officer having authority under the laws to grant permission to enter such limits" (3 Op. Atty. Gen. at 271). The

fact that a post office was located at the Academy made no difference since persons entering the post had no legal right to resort to it, except by permission of the commandant (*ibid.*). Similarly, the Superintendent may "prevent any person, or class of persons, not connected with the academy, from residing at or resorting to [the wharf or hotel], if, in the judgment of the superintendent, such a measure is required by the true interest of the service" (*ibid.*). As to persons actually living in houses on the post, the Attorney General said that the Superintendent "has a general authority to prevent any person within [the base] limits from interrupting its discipline, or obstructing in any way the performance of the duties assigned by law to the officers and cadets. * * * In the exercise of a sound discretion, the commandant of the post may, therefore, order from it any person not attached to it by law,[20] whose presence is, in his judgment, injurious to the interests of the academy" (*id.* at 272). The only suggested limitation on this power is when the resident civilian has a lease which is not revocable at the will of the United States.[21] And even as to this situation, the Attorney General stated (*id.* at 273):

> But although the power of the military commandant to remove a person guilty of miscon-

[20] The opinion said that the postmaster was such a person as his commission entitled him to remain until removed by the Postmaster General (3 Op. Atty. Gen. at 272).

[21] By the end of the nineteenth century, however, it became firmly established that such an irrevocable lease of property on a military base was invalid without specific congressional authorization (see *infra*, pp. 45–49).

> duct from the possession of a building may thus be modified by his official character [*i.e.*, the postmaster], or by the nature of the tenancy, I think there can be no doubt of his authority to exclude such person, in the mean time, from access to any part of the post not essential to the use of the building he may occupy, and to his ingress and egress to and from it. His general powers, were they not modified by circumstances, would enable him to remove the party altogether * * *.

Attorney General Butler's views of the broad discretionary power of a military commander were formally repeated by the Attorney General in 1906: "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand" (26 Op. Atty. Gen. 91, 92). They have also been reiterated again and again by Judge Advocates General of the Army. General G. Norman Lieber, in an opinion on October 15, 1896 (see Dig. Op. J.A. Gen. (1912), p. 267),[22] expressly concurred in the view of the Department commander:[23]

> There is no doubt that a post commander exercising authority over a reservation (there

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[22] A copy of the full opinion of the Judge Advocate General, like the other such opinions cited in this brief, is temporarily in the possession of the Department of Justice. They were obtained either from the National Archives or from the Army Judge Advocate General's Office. The dates given, generally in parentheses, are those of the opinion.

[23] General Lieber stated in another opinion (July 5, 1899; see Dig. Op. J.A. Gen. (1912), p. 267): "The Post Commander has authority to exclude objectionable characters from the reservation * * *."

being no superior authority present) can in his discretion exclude all persons other than those belonging to his post from post and reservation grounds, but should he admit every body with the exception of one individual against whom no charge of wrongdoing existed,[24] it would be considered an abuse of discretion and the party proscribed would have good grounds for complaint.[25]

In 1902, Colonel George B. Davis, then Judge Advocate General of the Army,[26] issued an opinion which made clear—contrary to some suggestions in Attorney General Butler's 1837 opinion—that persons *living* on military bases had no vested right to remain (July 16, 1902; see Dig. Op. J.A. Gen. (1912), p. 267): "As residents upon a military reservation are a sort of tenants upon sufferance and may be removed in the discretion of the post commander, a [liquor] license to such persons [issued by the United States District Court for Alaska] would be held subject to such power of removal * * *." A new case arose in 1902 involving the power of the Superintendent of West Point to exclude persons from the Academy. Colonel Davis stated that "[i]t is well settled that a post commander can, in his discretion, exclude all per-

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[24] This indicates that there is a stricter substantive standard for exclusion (that is, indication of actual wrongdoing) when a base is generally open to the public.

[25] The opinion makes clear that such complaint as to an abuse of discretion is to a higher military authority. In the very case which finally resulted in the Judge Advocate General's opinion, denial of access to the base was appealed to the Department commander.

[26] He was also the author of *Military Law* (1st ed., 1898).

sons other than those belonging to his post from post and reservation grounds" (May 6, 1904; see Dig. Op. J.A. Gen. (1912), p. 267). This statement was used to justify the exclusion of a particular retired military officer from a base. The opinion makes clear that no trial-type hearing was held into the officer's alleged misconduct for it says that the Superintendent is responsible only to his military superiors and that an investigation of the alleged misconduct should be conducted, but only to ascertain whether the retired officer should also be court-martialed. That same year, Colonel Davis stated in an opinion that "a post commander * * * may remove persons who offend against such police regulations as he may have established with a view to carry out the purposes for which the post was established" and may forbid such persons to return (October 8, 1904; see Dig. Op. J.A. Gen. (1912), p. 267).

Colonel Davis said in an opinion on April 18, 1907 that (see Dig. Op. J.A. Gen. (1912), p. 267):

> It has long been held that it is within the authority of a post commander to eject any person from a military reservation whose presence or conduct is prejudicial to the public interest * * *; he may equally prevent an objectionable person from entering the military reservation. In both cases the act constitutes an exercise of legal discretion, and it should be based on substantial conditions of fact.

Two years later, Colonel Davis approved the exclusion of liquor dealers by the commanding officer of an Army base (April 6, 1909; see Dig. Op. J.A. Gen. (1912), p. 267). He quoted at length the "exhaus-

tive" opinion of Attorney General Butler and said: "I therefore concur in the views above set forth in respect to police control over military reservations in which the practice of the [War] Department for nearly a century is indicated." Colonel Davis also upheld the order of a post commander that a soldier's wife be removed from a base (July 14, 1909; see Dig. Op. J.A. Gen. (1912), p. 267). In an accompanying letter, he quoted from Attorney General Butler that the commandant of a post has the discretionary power to "order from it any person not attached to it by law, whose presence is, in his judgment, injurious to the interests of the academy." And in 1911 Judge Advocate General Enoch H. Crowder quoted the opinion of Attorney General Butler and said (September 15, 1911;[27] see Dig. Op. J.A. Gen. (1912), p. 267):

> This opinion has been frequently cited and held to establish the law as authorizing the commanding officer of a military reservation to exclude therefrom such persons, not having a lawful right to enter, as may be undesirable.
>
> The enactment of Section 45 of the Criminal Code [now 18 U.S.C. 1382; see Appendix, *infra*, p. 92] has placed the question on a more satisfactory basis, and today there can be no question that it lies within the discretion of a commanding officer to forbid the reentrance of an individual upon a military reservation. While this authority is one closely related to the duty of the commanding officer to maintain order

[27] The Digest incorrectly dates the opinion September 16, 1911.

> and discipline over the reservation which he commands, it is probable that, as in most other military questions, higher authority may also have a discretionary power to overrule the act of the subordinate. Such power should be exercised, however, with the greatest possible care since it is the subordinate who is directly responsible for the condition of the reservation and post.

General Crowder found no reason to interfere with the decision of a post commander to prevent a saloon keeper from entering the post to board or leave street cars or to use the railway station, privileges apparently allowed the general public.

In addition to the numerous opinions of the Judge Advocates General directly concerning the power of post commanders to exclude undesirable persons, it has long been well established that the Army and Navy have no power to grant irrevocable rights to use property on military bases. Irrevocable rights can only be granted if Congress passes a statute with specific authorization. This limitation on the powers of the executive rests, in large part, on the ground that military property cannot be committed to uses which may become incompatible with their military function. As applied to this case, the executive has no power to grant a right to enter and work on a military base which is not revocable whenever the executive believes this right is incompatible with the military function of the base.

In 1878 Attorney General Devens held that the Secretary of the Navy had no authority to allow a city

to construct a sewer on the grounds of a naval hospital (16 Op. Atty. Gen. 152):

> [H]e has not the authority * * * to grant permission to make such an extension so as to confer any legal title or right upon the city of Chelsea * * *. A mere license for the use of the grounds may be granted by him; but this, from its very nature, is revocable at all times either by himself, his successors, or any other officer of the United States having lawful charge of the property. In order that a legal right should be given to the city of Chelsea to construct and maintain its sewer through the Government grounds, an act of Congress would be necessary.

Attorney General Miller decided in 1890 that the Secretary of War had the authority to grant a license for the construction of an irrigating ditch in a military reservation but only if it was "revocable at the will and pleasure of the Secretary of War" (19 Op. Atty. Gen. 628, 629). See also 20 Op. Atty. Gen. 93, 97 (1891). In 1897 Attorney General McKenna stated with regard to the construction of a Roman Catholic chapel at West Point (21 Op. Atty. Gen. 537, 541):

> That these licenses transcend the statute [of July 28, 1892; *see infra,* p. 49] is plain. The statute provides for a definite term, with a power of even revoking that. The licenses provide for no term, and really commit the Government to a practical perpetuity. It would be idle to deny this—idle to deny that you do not expect to exercise * * * the power of revocation except in emergency. * * *
>
> The license should therefore be revoked and the petitioner remitted to Congress.

That same year, on the authority of the earlier opinion, Mr. McKenna determined that the Secretary of War could not license construction of a bethel on a naval base and that the applicant must also seek his license from Congress (21 Op. Atty. Gen. 565). And in 1898, Attorney General Griggs held that, while a railway track could be laid on a government reservation, it does not convey "a substantially permanent right to maintain a railroad" (22 Op. Atty. Gen. 240, 246). The opinion further stated (*id.* at 245):

> The right of an Executive Department of the Government to grant permission for the use of any part of the Government lands, except for Government purposes, has been several times considered by the Attorney-General. * * * In no instance that I know of has any Department assumed to grant anything more than a mere revocable license, subject to termination at any time at the will of the Government. That such license conferred no contractual right upon the licensee has been universally asserted by every Attorney-General who has had occasion to pass upon such concessions.

The Army Judge Advocates General have given numerous similar opinions. As Judge Advocate General Lieber described the legal situation (JAGO, C–2961):

> It is on the face of it impossible for Congress to provide by legislation for every case which may arise, because unforeseen necessities for permissions of various kinds * * * spring up, and these can only be met by an exercise of the power of the Executive. These permissions are not always granted by formal written licenses. They may not be reduced to writing at all, but

be entirely informal, oral permissions, to do acts which without them would constitute trespass. These are in effect and substance revocable licenses, just as much as those expressed in a written instrument. * * * Whether it be to enjoy some continuous privilege or to do a single act, makes no difference. All are in effect revocable licenses, emanating from the same authority. And the only advantage of the revocable license by written instrument is that it is the most convenient evidence of the permission. * * *

The power of the President probably does not extend to the granting of licenses for the doing of anything which would be an injury to the property, nor can he grant other than revocable permissions * * *. He can not grant licenses that are not revocable, so that if it be for the erection of a building, * * * the license must be revocable.

Similarly, a few years later, Judge Advocate General Davis stated (June 11, 1901): "In the absence of authority from Congress, the Secretary of War can have no authority to grant any usufructuary or other *interest* in lands of the United States; but a license is a bare authority to do a certain act or series of acts upon the land of the licensor without possessing or acquiring any estate therein." These principles have been applied by the Judge Advocate General in numerous cases, including denial of an application to build a bridge, one end of which was on a military reservation, since the application was not for a license revocable by the government at will but for a permanent right of property; denial of an application to establish a ferry across a river in a military reservation

when the application was not for a license revocable at will but for a permanent franchise; denial of an exclusive right to mine within a military reservation for a certain term of years; denial of a right for an indefinite period to use a portion of a military reservation for irrigation ditches; denial of a right permanently or indefinitely to use part of a military reservation as a burying ground; authorization of a telegraph company to erect posts on a military reservation if they were revocable at the will of the government when found to interfere with the purposes for which the reservation was established; authorization of laying pipes within an arsenal's grounds which were subject to removal at the will of the government; and authorization of a civilian to reside and do business on a military reservation under a revocable license. Winthrop, *Digest of Opinions of the Judge Advocates General of the Army* (1895), pp. 477–478, 625–626.[28] See also Dig. Op. J.A. Gen. (1912), p. 952.

The power of the executive to grant only revocable rights to use part of military bases is also reflected in proceedings in Congress. Congress passed the Act of July 28, 1892, 27 Stat. 321, allowing the Secretary of War to lease property, which he then had no power to lease, "for a period not exceeding five years and revocable at any time * * *." Congressman Outhwaite, the spokesman for the bill in the House, ex-

[28] On the basis of these opinions of the Judge Advocate General, Colonel Winthrop concluded (p. 624) that, "without authority from Congress * * * an executive department or officer [cannot] convey away any *usufructuary interest* in land of the United States" (emphasis in original).

plained that the leases would be "revocable within [five years] if there is a change of administration, or if, for good reason, the Secretary [of War] thinks they should be revoked" (23 Cong. Rec. 6535). Over the last fifty years Congress has enacted several similar statutes allowing the executive to make revocable leases with regard to portions of military reservations. The Act of August 5, 1947, 61 Stat. 774 (10 U.S.C. (1952 ed.) 1270) authorized the lease of military property not now required for public use for a period of five years unless a longer period would promote the national defense or be in the public interest. The power to revoke at will must be retained unless it is determined that omission of the provision would benefit the national defense or public interest and, in any event, the power to revoke in a national emergency must be retained. Congress has also provided that the executive may, by revocable licenses, permit the American Red Cross to build buildings on military reservations for storage of supplies in case of a serious national disaster (Act of June 4, 1920, 41 Stat. 785; 10 U.S.C. (1952 ed.) 1347), permit the Young Men's Christian Association to erect buildings on military reservations (Act of May 31, 1902, 32 Stat. 282; 10 U.S.C. (1952 ed.) 1346), and allow National Guard units of the states to use military installations (Act of June 3, 1916, 39 Stat. 166 (32 U.S.C. (1952 ed.) 1, *et seq.*)). The Army Regulations currently provide that "[t]he Secretary of the Army may, by revocable license terminable at his discretion as the public interest may require, permit the use of real estate belonging to the United States which is under his control, provided

the * * * license conveys no interest therein * * *" (AR 405–80, para. 5*c*(1)(*a*) (July 29, 1955)). The Regulations also give post commanders power "to grant revocable licenses and revoke such licenses" for bus and taxicab service on installations (AR 405–80, para. 6*b*(3)(*a*)) and to grant revocable licenses to military and civilian personnel to occupy quarters on the base and to revoke such leases because of, *inter alia*, military necessity (AR 405–80, para. 6*b*(3)(*i*)).

Numerous more recent statements of the Army Judge Advocate General's Office reconfirm the long-standing power of commanding officers to control access to military bases at their discretion. That Office again decided (see *supra*, p. 44) that what is now 18 U.S.C. 1382 contemplates the power of commanding officers to exclude improper persons from their commands[29] (JAG 680.44, December 27, 1924). Shortly thereafter, in upholding the power of a post commander to require a license for salesmen desiring to work on the post, it was said: "It is well settled that a post commander can, under the authority conferred on him by statutes and regulations,[30] in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline" (JAG 680.44, October 6, 1925;

[29] 5 U.S.C. 1382 admittedly does not, however, in itself grant this authority (see JAGA 1956/8970, December 27, 1956).

[30] The current Army Regulations (December 10, 1958) likewise state that "[t]he installation commander will establish appropriate rules governing the entry of persons upon and exit from the installation" (AR 210–10, para. 14).

see Dig. Op. J.A. Gen. (1912–1940), p. 925). The Judge Advocate General's Office has also stated (SPJGR 1944/3086 and 3129, March 23, 1944):

> Post commanders are charged with the safety and defense of their posts, and the proper administration thereof, and in connection therewith they have a discretionary authority with respect to the admission or exclusion of individuals other than personnel of the posts. This authority is subject to the limitation that it may not be arbitrarily exercised, but normally the post commander is the judge as to whether the exclusion or admission of persons is consistent with the proper administration of an Army post.

And, again, it has been said (JAGA 1956/8970, December 27, 1956):

> The authority of a commanding officer to restrict the entry of civilians upon an Army post arises from the responsibility imposed on him to safeguard the interest of the Government and the welfare of military personnel on the post. The manner in which such authority is exercised to promote good order and military discipline is within the discretion of the commanding officer concerned, subject to the limitation that it may not be exercised arbitrarily.

Accord, SPJGA 1944/6071, June 16, 1944.

These principles have been followed by the Judge Advocate General's Office in upholding a prohibition of all forms of door-to-door solicitation which was applied to representatives of the Watchtower Bible and Tract Society (the representative of the Society was summarily stopped by guards) (CSJAGA 1950/1924,

April 14, 1950); upholding the right of a commanding officer to allow local census takers on the post or to exclude them "in his discretion" (JAGA 1955/4865, May 13, 1955); determining that securities salesmen may be permitted on the military base "at the discretion of the installation commander"[31] (JAGA 1955/7420, September 20, 1955); stating that, in some instances, the commanding officer may find it "necessary and proper to exclude Federal" officials enforcing the Migratory Bird Treaty Act (JAGA 1954/2907, March 24, 1954; see 4 Dig. Op. J.A. Gen. 484); upholding the exclusion of charity solicitors believed to be engaged in sharp practices (no hearing indicated) (JAGA 1954/3606, April 6, 1954); deciding that a commanding officer can grant or deny "in his discretion" permission for a person to enter a military reservation in order to discover a treasure trove (JAGA 1955/4601, May 9, 1955); upholding the exclusion of life insurance agents or entire companies from a single Army base or all Army installations because of violations of Army regulations in that field (without a formal hearing)[32] (see, *e.g.*, JAGA 1957/7457, September 20,

[31] Army Regulations 210–10 (December 10, 1958), para. 51, states that "[s]olicitation on installations may be permitted at the discretion of the commander * * *."

[32] The Regulations provide for the withdrawal of the right to solicit only after a complete investigation (AR 600–101, para. 7*a* (January 30, 1958)). In addition, before an agent has his solicitation privilege withdrawn or suspended he must "be afforded an opportunity to be heard" (*id.*, para. 7*b*(2)). It is clear, however, that the Regulations do not contemplate a trial-type hearing since the evidence against the agent generally takes the form of affidavits and the opportunity to be heard generally means the opportunity to submit a written brief or an oral ex-

1957; JAGA 1955/10067, December 1, 1955; JAGA 1955/6864, August 15, 1955; JAGA 1955/5100, May 27, 1955; JAGA 1957/8507, October 30, 1957; JAGA 1957/7109, September 3, 1957; JAGA 1956/9099, December 26, 1956; JAGA 1956/7032, September 18, 1956; JAGA 1955/4052, April 20, 1955 (see 5 Dig. Op. J.A. Gen. 471); JAGA 1955/4910, May 19, 1955; JAGA 1957/5508, June 21, 1957; JAGA 1957/9309, December 13, 1957; JAGA 1957/6247, August 1, 1957; JAGA 1957/5738, June 28, 1957; JAGA 1955/4105, May 2, 1955).

In sum, it is clear that throughout our history commanding officers have controlled access to military bases summarily, and that any arbitrary use of their power has been appealable only to, and reviewable by, superior military or executive authority. Indeed, it is well established that a person cannot be given by the executive any right to use a military base which is not revocable at the discretion of the executive. Accordingly, civilian employees cannot be given, without authorization by Congress, a right to work on a

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planation. There is no comparable "opportunity to be heard" requirement before action can be taken against companies but they are also generally offered an opportunity to explain. Exclusion of agents or companies from all Army posts is determined by Headquarters, Department of the Army (*id.*, para. 7*c*, *d*)—an installation commander can exclude only from his own post.

The Regulations as to automobile insurance salesmen provide for withdrawal by the post commander of the privilege of solicitation for violation of the Regulations or for engaging in other practices "detrimental to the best interests of military personnel." These Regulations also give "[t]he agent concerned * * * the opportunity to be heard" (AR 608–10, para. 6*e* (October 22, 1957)).

military base which is not revocable at the will of the executive. Thus, contrary to petitioners' contention, the burden is on petitioners to show that Congress has authorized or required the executive to surrender its inherent power to revoke at will any license to enter military bases; the burden is not on the executive to show specific authorization for the power to revoke Mrs. Brawner's badge. If, as petitioners maintain, Congress has not acted, Mrs. Brawner's right to enter the Gun Factory for employment purposes is revocable at the discretion of the executive, just as it has been for well over a hundred years.

The underlying reason for the historic plenary power of commanders over access to military bases is the vital need to maintain command authority and, therefore, responsibility (see Opinion of Judge Advocate General Crowder, *supra,* pp. 44–45). As the regulations and manuals relied on above demonstrate (pp. 26–27, 28), military officers are given "absolute" authority and responsibility for their base commands in general and for the security of these commands in particular—to the extent that base commanders have discretion to exclude persons from their installations even when the visit has been approved by higher military authority (see *supra,* p. 28). To require notice and hearings, whether before or after a person has been excluded from the base, would clearly and seriously interfere with command authority and responsibility which depends on quick and conclusive action by military commanders.

3. *The contract.*—Petitioners claim (Pet. Br. 65–66) that the security provisions in the contract between

the Concessionaire and the Gun Factory—that the Concessionaire cannot employ persons not meeting the security requirements of the base—cannot confer independent authority on the government to deny Mrs. Brawner access to the base. But the government does not claim that the agreement gave it such authority for the action taken. Rather, the contract is merely a manifestation and recognition of the lawful authority of the Superintendent of the Gun Factory given by the regulations and manuals. It was neither erroneous nor surprising that this provision was cited as the basis for withdrawing petitioner Brawner's badge by respondents in dealing with the Concessionaire and its employees (see R. 32–33, 59–60, 63, 68–69), instead of the authority given to the Superintendent of the Gun Factory which underlay the agreement.

Petitioners argue that the agreement may not be relied upon because it is in conflict with the National Labor Relations Act—that is, the Concessionaire violated its duty under Section 9(a) of the Act (29 U.S.C. 159(a)) to bargain exclusively with petitioner Union as to conditions of employment by including the security provision in its agreement with the Gun Factory (Pet. Br. 67–68)—and because petitioner Union had no knowledge of this provision (Pet. Br. 68, note 41). As we have said, the validity of the contract as against the petitioners is irrelevant in deciding whether the government had lawful authority to act. In any event, the agreement merely reflects the lawful authority of the government to keep persons not meeting security requirements from the base and therefore incidentally from their place of employ-

ment.[33] Certainly, the National Labor Relations Act was not intended to limit the long-standing authority of military officers to control access to their commands."

The fact that petitioner Union had no knowledge of the security provision in the contract between the Concessionaire and Gun Factory is immaterial. The Union's function was limited to representing its members in collective bargaining with the Concessionaire regarding wages, hours, and working conditions. The security requirements of the Naval Gun Factory are clearly not proper subjects of collective bargaining between the Concessionaire and the Union.[34]

II

THE INTEREST OF A PRIVATE PERSON IN HAVING ACCESS TO A MILITARY BASE IN ORDER TO BE ABLE TO WORK THERE FOR A PRIVATE EMPLOYER IS NOT "LIBERTY" OR "PROPERTY" ENTITLED TO PROCEDURAL DUE PROCESS PROTECTIONS

Petitioners contend (Pet. Br. 77–84) that Mrs. Brawner was denied due process of law by the summary action of respondents causing her "to lose her job, to impair her employment opportunities, and to besmirch her reputation" (Pet. Br. 77). But Mrs.

[33] It is also significant that Section 2 of the National Labor Relations Act (29 U.S.C. 152) states that the term "employer" shall "not include the United States or any wholly owned Government corporation." While here the federal government was not the employer, this statutory provision strongly suggests that the Act was not intended to concern action by the federal government in its capacity as the owner of property.

[34] The Union could have obtained a copy of the agreement by asking either the Concessionaire or the Gun Factory for it.

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Brawner did not in fact lose her job with the Concessionaire and her employment opportunities have not been impaired as much as she claims (see *supra*, pp. 20–22). Instead, her employer, in effect, transferred her to another position because she no longer had the qualifications to work at the Gun Factory. She had no constitutional right to have a hearing before such a transfer could be made. As the court of appeals stated (R. 159):

> * * * [B]y way of analogy, certainly no one would doubt the authority of the Supreme Court to require its private printer to transfer a Linotype operator who, without wrongful intent, portrayed to his friends at afternoon stops in a convenient bar the nature of the opinions he was putting in print. No one would contend, we think, that the right of a Linotype operator to work on the advance printing of opinions of the Court is such that he could not be removed from the premises without a hearing in full panoply of charges, confrontation of witnesses, compulsory disclosures in public by his cronies, cross-examination, and findings. An investigation sufficient to satisfy the Court of the afternoon garrulity of the employee and a quiet word to the printer would be all such a situation would entail, we think. He could be put to work somewhere else.

See also the concurring opinions of Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 181, and *Peters* v. *Hobby*, 349 U.S. 331, 352, discussed *supra*, p. 21, note 10.

Petitioners' due process argument must therefore depend on the injury to Mrs. Brawner's reputation by

having her badge withdrawn as a "security risk." As we will show (pp. 83–88), this injury to reputation is not in itself entitled to constitutional protection. First, however, we will contend (pp. 61–83) that, even if Mrs. Brawner had in fact lost her job and her employment opportunities, she was denied no rights which are protected under the Fifth Amendment.[35]

It may be helpful to say explicitly, at the outset of this constitutional discussion, that we do not think these issues can be fruitfully discussed in terms of petitioner's "standing," for the action taken in this case clearly affects sufficient interests to enable petitioners to assert whatever rights they may have. Cf. *Greene* v. *McElroy, supra,* 360 U.S. at 493, note 22. The question is essentially one going to the merits and turns on whether petitioner Brawner has any "rights" which traditionally have been, or ought to be, accorded judicial protection. In its primary form, the issue is

[35] Petitioners also claim (Pet. Br. 84–86) that Mrs. Brawner's rights under the First Amendment were violated, but this contention is plainly without substance. Certainly, the naval commander here could have withdrawn her badge for security reasons after a full trial-type hearing even though freedom of speech, the press, and association might to some extent be indirectly affected. This could result since persons can without doubt be excluded from military installations on the basis of speech or action which may be within the general area of the First Amendment, but which raises a suspicion that the person is or could easily become a security risk, or even merely produces a lack of confidence in the person. Since the inherent effect on First Amendment rights is substantially the same whether or not trial-type procedures are afforded, the only real issue is whether such procedures are required by the due process clause of the Fifth Amendment.

whether her interest in access to the Naval Gun Factory amounts to "liberty" or "property" of which she cannot be deprived without procedural due process of law. It is not enough that Mrs. Brawner has been seriously hurt by the action taken, for it is not true, as suggested, that procedural due process is required whenever substantial interests are affected by governmental action. Every day there are substantial interests affected in one way or another by legislative or administrative action which cannot call upon the procedural protections of the Fifth or Fourteenth Amendments.[36] For constitutional protection to be afforded, some "liberty" or "property" must first be deprived. These are, of course, not terms of immutable content; but they are limitations on the scope of the due process clause and require distinctions, not only on the basis of the substantiality and directness of the impact of government activities, but also on the basis of the "nature" of the interests affected. They afford the dividing line between those interests which are judicially protected against governmental interference and those for protection of which reliance must be placed upon the other branches of government.

[36] For example, selection of contractors; fixing the terms and conditions upon which the government will contract; the determination of federal grants and aids; refusal to hire; refusal to make loans; changes in federal borrowing policies and procedures; changes in interest rates or central-bank practices; decisions by the Department of Justice to prosecute or not to prosecute, to bring a civil suit or not, to appeal an adverse judgment or not, to compromise a case or not, etc.

A. ACCESS TO A MILITARY BASE IS A PERMISSIVE USE OF PROPERTY AFFORDED BY THE GOVERNMENT SOLELY FOR ITS OWN CONVENIENCE; NO ANALOGOUS INTEREST HAS EVER BEEN RECOGNIZED AS LEGALLY PROTECTED

1. We will assume, *arguendo,* as petitioners allege (but see *supra,* pp. 21–23), that Mrs. Brawner has lost her employment and has been seriously hampered in obtaining other work by being denied access to the Gun Factory for "security reasons." The fact remains, however, that the subject matter of the government's action, and the only power asserted by it, was the refusal to allow her, a private person, to enter a military base, the protection of which was the responsibility of the government. Such access is made available to private persons solely for the convenience of the government—when necessary to have services performed—and not to confer benefits or advantages upon the recipient. If the recipient has any interest at all in entering the base, it can be described as only a "permissive use" for the primary convenience and benefit of the government. When, therefore, the government determines that it is no longer to its interest that a private person have access to the base, it is exercising its proprietary power over property committed to its custody, to terminate an arrangement, at sufferance, entered into for its own convenience and benefit.[37]

The interest of petitioner Brawner affected by such action is not one that has traditionally been accorded judicial protection. See *supra,* pp. 37–55. Petitioners' attempt to analogize the action to an interference with

[37] This arrangement is reflected in the agreement between the Concessionaire and the Gun Factory (see *supra,* p. 3).

contractual relations (Pet. Br. 88–89) is unsupportable, for there can be no doubt that a private person would be legally free to take precisely the same action for the protection of his property and other interests. The effort here is not to subject the government to duties comparable to those of a private person but to subject it to greater duties because it is the government, and it is in that light that the question must be viewed. In reality, the issue is whether Mrs. Brawner's interest is one entitled to constitutional protections notwithstanding that it is not otherwise accorded recognition in our law.

2. The action of the government in this case—the withholding from Mrs. Brawner of the opportunity to enter a military base—is very different in nature from the exercise of a legislative power to affect the legal rights and duties of private persons at large. In licensing cases, for example, the administrative denial of a license derives its force from a statute making it illegal to engage in the activity without one. The effect of the administrative action is to impose a legal disability upon the person denied the license. The imposition of such a disability is true of all the cases involving private employment relied upon by petitioners to support their constitutional argument (Pet. Br. 81–84, 87–88): *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9), seamen and longshoremen were permanently barred from their occupation and employment by private shipowners unless cleared by the Coast Guard, whether or not government contracts or shipments were involved; *In re Burke*, 87 Ariz. 336, 351 P. 2d 169, where admission to the bar was a prere-

quisite to the private practice of law; *Truax* v. *Raich*, 239 U.S. 33, where employment of aliens in excess of a prescribed number in one of the "common occupations of the community" was forbidden. See also *Schware* v. *Board of Examiners*, 353 U.S. 232, which likewise involved admission to the bar; *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, where adherents to the Confederacy were barred from religious teaching and the practice of law; and *Yick Wo* v. *Hopkins*, 118 U.S. 356, involving a state licensing practice found to be racially discriminatory.

It may be that in some situations—but not in that before the Court in this case (see *supra*, pp. 20–33)—the denial of entrance to a military base may have the same practical consequences as would a legal bar to his employment in an entire occupation or industry. But to say that for this reason the two actions must be subject to the same restrictions is to ignore the whole history of the development of legal rights and constitutional protections, in which the nature of the interest, and not simply the substantiality of the injury, has been of controlling importance. The difference in the nature of the powers asserted is crucial: in the one case, the government is asserting a legislative power to regulate (by creating legally-enforceable rights and duties) an industry or a class of persons at large and to control their dealings with one another; in the other case, it is exercising a power, no different in nature from that of any private person in respect to his own property, to control the use of its own property.

That distinction is deeply rooted in our law. It has, for example, been frequently asserted as the basis for denying the standing of government contractors to object to administrative action by which they are deprived of the award of contracts. In the leading case, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, bidders sought to enjoin the inclusion in proposed contracts of provisions requiring them to pay the prevailing wage in the "locality" as determined by the Secretary of Labor, alleging that the Secretary's determination was in violation of the statute, would prevent them from competing with bidders in other areas, and would thus cause them irreparable injury. The Court, in an opinion by Mr. Justice Black, held that the bidders had no standing to challenge the legality of the Secretary's action:

> We are of opinion that no legal rights of respondents were shown to have been invaded or threatened * * *. It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. * * *. [p. 125]
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> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. * * * Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice

and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government. [pp. 127–28]

* * * * *

The Act does not represent an exercise by Congress of regulatory power over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. * * *. [pp. 128–29]

* * * * *

The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation. On the contrary, respondents in effect seek through judicial action to interfere with the manner in which the Government may dispatch its own internal affairs. And in attempted support of the injunction granted they cite many cases involving contested Government regulation of the conduct of private business. Their cited cases, however, all relate to problems different from those inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government's own supplies. [pp. 129–30]

The practical effect of the Secretary's wage determination in that case upon a contractor dependent entirely upon government contracts would obviously be the same as a legal duty to pay the prescribed wage imposed by "an exercise by Congress of regulatory power over private business," and it requires no

citation of authority to show that in the latter event the contractor would have been entitled to challenge an allegedly illegal determination by the Secretary.

A similar case is *John & Sal's Automotive Service* v. *Sinclair Refining Co.*, 165 F. Supp. 518 (S.D. N.Y.). There, the State of New York contracted with Sinclair to provide emergency road service on its highways. The contract provided that Sinclair could subcontract for plaintiff to perform part of the job, subject to the continuing approval of the State. If the sublicensee's services proved to be unsatisfactory to the State, Sinclair could terminate by giving the sublessee twenty-four hours' written notice. The State notified Sinclair that the sublessee's service was unsatisfactory and Sinclair terminated the contract with its sublessee. In answer to the sublessee's claim against the failure of the State to notify the sublessee of the contemplated action and to provide a hearing on the issue whether its service was satisfactory, the district court held (*id.* at 522):

> * * * In notifying Sinclair that plaintiff's service was not satisfactory the agencies did not adjudicate that question. They merely asserted their claim that the sublicense should be ended because of unsatisfactory service. This claim was in no sense a "quasi-judicial" determination of that proof. Nor was any order entered purporting to affect the rights of the plaintiff under its contract with Sinclair. The vital distinction between the situation at bar and the cases in which notice and hearing are required is that the agencies were not here exercising any governmental function. It is

> the exercise of such a function that brings into play the "notice and hearing" requirement of the due process clause. Put another way, the agencies here were only exercising the right which their contract with Sinclair gave them: to declare their belief that plaintiff's service was unsatisfactory and to request that its sublicense be cancelled. "When a state becomes a party to a contract * * * the same rules of law are applied to her as to private persons under like circumstances." * * *

Not only do the *Lukens Steel* and similar cases demonstrate the essential difference between action by the government in its proprietary capacity and its action in a regulatory capacity—so far as individual rights are concerned—but they also show that those dealing with the government in its former capacity ordinarily do not acquire any interest entitled to judicial protection. In turn, if the interest one has in obtaining and retaining government contracts—or, as in this case, in working for a company which has one—is not sufficiently significant for protection against action in violation of express statutory commands (as was alleged in *Lukens*), it is difficult to see how it can amount to "liberty" or "property" which, under the Fifth Amendment, can be taken from him only by a trial-type hearing.

3. It is true that the fact that an interest is not accorded judicial protection for other purposes does not necessarily mean that governmental action affecting it is entirely immune from constitutional restraints. For example, although no one has a "right" to government employment in any meaningful sense,

this Court has observed that "None would deny" that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.'" *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. In *Wieman* v. *Updegraff*, 344 U.S. 183, 192, the Court held unconstitutional a denial of state employment on grounds of innocent membership in allegedly subversive organizations, stating: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Similarly, in *Slochower* v. *Board of Education*, 350 U.S. 551, automatic dismissal from state employment on the sole ground that the employee invoked the Fifth Amendment privilege against self-incrimination before a federal legislative committee was held to violate due process. That the *Slochower* decision was not based on any lack of procedural protection is made clear by *Lerner* v. *Casey*, 357 U.S. 468, where a city employee was discharged as a security risk for refusal to answer questions asked by his employer. *Slochower* was distinguished on the ground that the state could rationally conclude from the employee's refusal to answer that he was of doubtful trust and reliability, and therefore was a security risk. *Id.* at 476–478.[38]

[38] The courts have, of course, held in numerous other situations that the executive has power to act summarily or (at least) without a trial-type hearing, even though particular persons are drastically affected. See, *e.g.*, the government employee discharge cases, *infra*, pp. 73–74; cases involving access to and use of government property, *infra*, pp. 75–76; *Knauff* v.

From these and comparable cases, it follows that, although no one has a legal right to access to a military base, the government could not establish a policy of denying access to such bases solely on the basis of color or some other ground bearing no rational relationship to a legitimate governmental object.[39] To assert, however, that it also follows that a trial-type hearing must be afforded in applying a proper substantive standard is to ignore an important and fundamental difference between "substantive" and "procedural" due process. We suggest that the true explanation of the *Public Workers—Wieman—Slochower* line of cases is an evolving doctrine that the Constitution itself creates an affirmative right, regardless of the nature of the interests affected or of the protection otherwise afforded them, not to be discriminated against by state or federal government on the basis of an invidious classification. The evil condemned is the discrimination itself, and it is not essential that the governmental action affect any other legally-rec-

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Shaughnessy, 338 U.S. 537 (exclusion of aliens); *Ludecke* v. *Watkins*, 335 U.S. 160 (removal of enemy aliens); *Dakota Central Telephone Co.* v. *South Dakota*, 250 U.S. 163 (seizure of telephone lines); *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103 (denial of a certificate of convenience and necessity to operate a foreign air line route).

[39] There is no merit to petitioners' apparent suggestion (Pet. Br. 10–11) that there was no rational support for removal of Mrs. Brawner's badge, since this action was based on insignificant evidence of her connection with Communism. Since the reason for the action by the Gun Factory has never been disclosed, and does not appear on this record, it is impossible to determine on what information it was grounded. And there can be no doubt that access may be refused for the series of reasons comprised within the term "security reasons" (see *infra*, pp. 85–86).

ognized interest apart from the right to be free from discrimination. In its procedural requirements, on the other hand, the due process clause is necessarily a purely negative command; one does not have a "right" to have a fair hearing but only a right not to be deprived of certain kinds of interests *without* a fair hearing. Accordingly, an existing interest must be recognized independently of the due process clause before its procedural requirements become applicable.

Although the Court has not made this distinction explicit, it is one expressly made in the Fourteenth Amendment in the difference in wording between the equal protection clause and the due process clause: while the command of one is that no person shall be deprived of "life, liberty, or property, without due process of law," the command of the other is simply that no person shall be denied "the equal protection of the laws." The latter is absolute, while the former is in terms applicable only to a deprivation of life, liberty, or property. We suggest that, in the development of "substantive" due process, much of the concept of the equal protection clause has, in effect, been incorporated into the due process clause (cf. *Bolling* v. *Sharpe*, 347 U.S. 497) and it is primarily that concept—an invidious classification by the state in itself offends the Constitution regardless of the nature of the interests that are the subject matter of the action—that explains the Court's holdings that an arbitrary classification of persons excluded or expelled from public employment violates due process whether or not there is a "right" to public employment.

But while this interest protected by *substantive* due process springs, in some cases at least, from the Constitution itself (*i.e.*, the interest in being free from invidious official discrimination), the interest sought to be protected by *procedural* due process must spring from other sources and have an existence independent of the interest in procedural due process. While freedom from discrimination on invidious grounds (*e.g.*, color, religion, etc.) may be an end in itself, procedure is a means rather than an end. It does not exist *in vacuo*. Its function is to minimize possibilities of error or unfair evaluation *in dealing with some substantive interest;* and a substantive interest must therefore be recognized before procedural due process can be claimed. Accordingly, whatever may be the rule in substantive due process cases (at least as to certain kinds of discrimination), there remains the problem, whenever a right to procedural due process is claimed, of defining the nature of the substantive interests sought to qualify as "life, liberty, or property."

4. None of the cases cited by petitioners, therefore, supports their claims that Mrs. Brawner's interest in access to the Naval Gun Factory is one constitutionally protected against deprivation without procedures satisfying the standards of due process. The cases involving governmental regulation of private persons in their dealings with each other present, as we have seen, very different problems. The only cases involving analogous (though clearly distinguishable) interests are those dealing with government employment, and each of those involved only substantive, and

not procedural, due process questions. In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, the only other case on which substantial reliance is made (Pet. Br. 78–81), the official action taken would admittedly have constituted defamation at common law and thus invaded a legally-recognized right. As we show below (pp. 83–88), the alleged injury to petitioner Brawner's reputation in this case cannot afford an independent basis for invoking constitutional protection if the action taken did not otherwise violate constitutional rights.

B. CONTROL OVER MILITARY BASES IS AN EXECUTIVE FUNCTION WHICH HAS NEVER BEEN, AND SHOULD NOT BE, SUBJECTED TO JUDICIAL REVIEW

1. For reasons implicit in the constitutional separation of powers, the courts have traditionally refused to intervene in the conduct by the government of its internal affairs. These are matters which have wisely been left to the discretion of the executive and to correction, if necessary, by political processes. As this Court long ago recognized, and has frequently repeated, "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them." *Decatur* v. *Paulding*, 14 Pet. 497, 516.[40] Underlying

[40] See also *Perkins* v. *Lukens Steel Co.*, *supra*, 310 U.S. at 131–132; *Adams* v. *Nagle*, 303 U.S. 532, 542; *United States ex rel. Girard Co.* v. *Helvering*, 301 U.S. 540, 543; *United States ex rel. Chicago Gt. Western R.R. Co.* v. *I.C.C.*, 294 U.S. 50, 62; *Wilbur* v. *United States*, 281 U.S. 206, 218; *Work* v. *Rives*,

this judicial restraint is the conviction that with responsibility must also go power and that it is not on the courts alone that citizens must rely for protection: "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry. Co.* v. *May,* 194 U.S. 267, 270; *FCC* v. *Pottsville Broadcasting Co.,* 309 U.S. 134, 146; *United States* v. *Butler,* 297 U.S. 1, 87 (Mr. Justice Stone dissenting).

As we have noted (pp. 64–67), one such area in which the courts have been reluctant to interfere is the award of government contracts. Another is the power of removal of government employees. In cases challenging the validity of administrative dismissals of government employees, the courts have refused to go beyond a determination that any procedural or substantive rights *granted by Congress* have been complied with.[41] That history was canvassed in detail in the opinion of the court of appeals in *Bailey* v. *Richardson,* 182 F. 2d 46 (C.A. D.C.), affirmed by an equally-divided Court, 341 U.S. 918, upholding the constitutionality of the dismissal of government employees on loyalty grounds without confrontation of witnesses, and need not be repeated here. It is suffiicent to say, as the court of appeals there concluded, that "Never in our history has a Government

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267 U.S. 175, 183; *Hall* v. *Payne,* 254 U.S. 343, 347; *Litchfield* v. *The Register and Receiver,* 9 Wall. 575, 577; *Gaines* v. *Thompson,* 7 Wall. 347.

[41] Subject, of course, to the requirement that the statutory grounds for dismissal may not be patently arbitrary or discriminatory. See the discussion of the *Wieman* and *Slochower* cases, *supra,* pp. 68–71.

administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service" (180 F. 2d at 57), and that no court has ever held such process to be required. While it might be suggested that loyalty or security programs introduce a new problem in this area, it may be doubted that there is a constitutional distinction between the injury to persons dismissed on such grounds and, for example, the injury suffered by one dismissed, without criminal conviction, for accepting bribes (*Eberlein* v. *United States,* 257 U.S. 82), theft (*Kent* v. *United States,* 105 C. Cls. 280), or attempted seduction by force (*Golding* v. *United States,* 78 C. Cls. 682, certiorari denied, 292 U.S. 643). In those cases, too, the courts have refused to find interests of sufficient character to be protected by procedural due process. And in *Vitarelli* v. *Seaton,* 359 U.S. 535, 539, this Court stated that a government employee not protected by statute or regulation could be summarily discharged "at any time without the giving of any reason." [42]

[42] The court of appeals similarly said below (R. 158):

> Except for special classes, Government employees may be removed summarily without charges and, except for the provisions of the Lloyd-La Follette Act, without reasons. A holding to the contrary would necessitate a ruling that the Lloyd-LaFollette Act is and always has been invalid; that the hundreds of employees discharged under its procedural terms since 1912 were wrongfully discharged; and that Government employment at all levels carries life tenure, *i.e.*, inherent, constitutionally protected invulnerability to discharge, except upon charges, open hearings, confrontation by witnesses, cross-examination, and findings. Such conclusions have no support in law, in our opinion.

2. The summary power of the executive to control persons desiring to come on or use government property—particularly military property—is even more clear. Article IV, Section 3, Clause 2, of the Constitution gives Congress the power to control and dispose of the property of the United States. "The power over the public land thus entrusted to Congress is without limitations." *United States* v. *San Francisco,* 310 U.S. 16, 29. Congress may delegate to the Executive the authority to make rules and regulations respecting the conditions under which persons will be allowed to enter and use public land. *United States* v. *Grimaud,* 220 U.S. 506. Whether exercised by Congress or the executive, the government has absolute control over property of the United States and under this power may exclude persons who have been using such property, even when this exclusion causes pecuniary damage. See, *e.g., Utah Power & Light Co.* v. *United States,* 243 U.S. 389; *United States* v. *Midwest Oil Co.,* 236 U.S. 459; *Light* v. *United States,* 220 U.S. 523; *Camfield* v. *United States,* 167 U.S. 518. Moreover, when the government chooses to admit some persons upon its property, it can properly condition this privilege. "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of * * *." *Davis* v. *Massachusetts,* 167 U.S. 43, 48. Similarly, in *Packard* v. *Banton,* 264 U.S. 140, 145, the Court stated: "* * * [A] distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government

sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former." Thus, there can be little doubt that the executive has the constitutional power to base admission to government property on conditions, and to exclude persons from this property whenever it believes their presence is inconsistent with the use of the property. No judicial decision has ever suggested that this power can be exercised only on the basis of an adjudication after a hearing.[43]

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[43] Petitioners claim (Pet. Br. 98) that, if the government has power to control access to its property summarily, this power would have been conclusive in the recent government employee cases such as *Cole* v. *Young*, 351 U.S. 536 and *Peters* v. *Hobby*, 349 U.S. 331. However, this power to exclude summarily cannot be used to deprive government employees of whatever rights they may possess under the Constitution, statutes, or regulations. The incidental question of access to government property cannot be used in such a situation to swallow up the basic question of the right to employment. In this case, however, Mrs. Brawner, being the employee of a private company, has no rights *vis-à-vis* the government except her claim of right to access to government property.

Petitioners cite (Pet. Br. 102–103) *Tucker* v. *Texas*, 326 U.S. 517, and *Marsh* v. *Alabama*, 326 U.S. 501, which held unconstitutional attempts to prohibit the distribution of religious literature in towns owned by the federal government and a private corporation, respectively. It is clear, however, that the basis of these decisions was that both towns were open to the public: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it" (*id.* at 506). Certainly, persons have no constitutional right to enter government property, and especially a military base, which is closed to the public, whenever they wish to distribute religious literature.

What is true of the executive's power to make contracts, to dismiss government employees, and to decide who may come on or use ordinary government property is true with redoubled force of the power to say which private persons may have access to military bases—for here we are dealing with the most vital interests of the nation. In no area is the constitutional responsibility of the executive branch any greater or clearer; if there are to remain any powers of the executive free of judicial supervision, they must include the ultimate and absolute control of military installations for which the executive has responsibility. And in no area is the history of summary action by the executive more clear than as to access to military bases (see *supra*, pp. 37–55). This history, which has not even been judicially challenged until this litigation, shows that the due process clause of the Fifth Amendment has never been regarded as conveying any procedural rights, vindicable in the courts, to persons seeking to enter military bases.

Of course, due process is not a static concept and pages of history, for all their significance, do not necessarily control in the face of new circumstances and new problems. But the assertion that the problems presented by modern day security programs are essentially different in nature from the age-old problems of internal administration of the government cannot be accepted without qualification. While the expansion of military activities means that larger numbers of people are affected, it is doubtful whether the number of persons affected today by the military's control over access to its installations is proportionately

higher than in the nineteenth century. And it does not seem particularly relevant to the scope of the constitutional protections that many persons, rather than a few, may suffer the same kind of injury; the rights, like the injuries, are individual. In any event, the great expansion in the responsibilities of the government and the increased dangers to our society give added significance to the need for broad discretion and flexibility in determining how these responsibilities should be carried out. In short, we find no substantial reason—and petitioners suggest none—for suddenly creating at this time a right to enter military bases within the protection of the due process clause.

3. The lack of a constitutionally protected interest in access to a military base for purposes of private employment is graphically shown, we believe, by the circumstances of this case. First, as we have indicated (see *supra*, pp. 21–22), petitioner Brawner was not deprived of her employment nor of future employment opportunities, but only of a job at one of the two locations at which her employer was operating. Second, whatever interest Mrs. Brawner had in her particular job, it was obviously contingent on the government's not taking summary action (other than removal of her badge) which it clearly had a right to take. Certainly, the Navy could summarily close the Gun Factory entirely; summarily cancel its contract with the Concessionaire before the expiration date (the only possible remedy would run in favor of the Concessionaire); or summarily decide, upon expiration of the then existing contract, that no new concessionaire would be permitted to operate at the Gun

Factory. Any of these possibilities would mean that Mrs. Brawner would lose her job at the Gun Factory and, if the Concessionaire were not able to employ her at another location, that she would lose her employment and seniority rights as well. In addition, Mrs. Brawner's continued access to the Gun Factory, and thereby to her work, was conditional upon her meeting the Factory's security requirements.

As it happened, the failure of the last condition happened first, although subsequently the Concessionaire lost its contract and the Navy drastically reduced operations at the Gun Factory (see *supra*, pp. 7, 20 at note 9). Thus, even if Mrs. Brawner's badge had not been withdrawn, her job would have soon been in danger. While she has been offered a job with the new concessionaire, this is new employment with a different employer, even if the character of her work happens to remain the same. And it is possible that this new job may not exist much longer after the cafeteria operations at the Gun Factory are reduced proportionately with the reduction of other employment at that installation (see *supra*, p. 20, note 9).

Mrs. Brawner's claimed right to employment actually exists only *vis-à-vis* her employer, the Concessionaire. Yet, throughout their argument, petitioners confuse Mrs. Brawner's status with respect to the Gun Factory with her status with respect to her employer, M & M, an entirely different entity. Mrs. Brawner may have acquired certain rights against her employer by virtue of the collective bargaining agreement in force, such as those involving job security, seniority, sick leave, annual leave, re-

tirement benefits, promotions, etc. The Gun Factory was neither a party to this agreement, nor subject to its terms. To say that Mrs. Brawner could exert the rights acquired from the Concessionaire under the collective bargaining agreement against the Gun Factory is to make the Gun Factory a subordinate adjunct of the Concessionaire. On the contrary, the power of the government over security at the Gun Fatcory is completely independent. As part of his power over the government property on which the agreement was to be carried out, the commanding officer could effect modification of the collective bargaining agreement to the extent that security requirements of the Gun Factory demanded.

4. It does not appear to be questioned in this case that the final responsibility to determine which private persons may enter a military base must lie in the executive; that the executive may ultimately act in this area on doubts or simply a lack of complete confidence; and that the ultimate determination and judgment of the executive are not judicially reviewable. Notwithstanding the discretionary nature of the ultimate judgment, however, petitioners contend that Mrs. Brawner is constitutionally entitled to an opportunity, in a hearing, to put her case before the officials who are to make the judgment before they exercise their discretion. This notion of a constitutionally required hearing for action which may, if necessary, be based on no more than doubt and which itself is not judicially reviewable has no analogue in the law. As Judge Wyzanski observed in *Von Knorr* v. *Miles*, 60 F. Supp. 962, 971 (D. Mass.), judgment vacated on

other grounds *sub nom. Von Knorr* v. *Griswold,* 156 F. 2d 287 (C.A. 1):[*]

> Notice, hearing, counsel and the like are admittedly usually appropriate criteria of due process of law. But these guarantees have significance only if in the end the government's right to act turns on an official finding that certain facts exist. Where in rare cases such as orders excluding persons from defense plants in war time, the government's right to act is absolute and not dependent upon the facts concerning, or the merits of, any particular case, the formalities of a notice, hearing and counsel are not requisite. No matter what evidence might be offered by counsel for the government or counsel for the individual, the government would remain legally free to disregard the testimony and rely upon its uncorroborated suspicions. [Citations omitted.]

Prime Minister St. Laurent, in a statement to the Parliament of Canada dealing with the problem of security among government employees, similarly emphasized the non-adjudicative character of security determinations (Dominion of Canada, *House of Commons Debates,* 1951, vol. II, 2d Sess., pp. 1504–1506; see Ass'n of the Bar of the City of New York, *The Federal Loyalty-Security Program* 201 (1956)):

> * * * The question at issue is not guilt or innocence of some particular charge. The sole

[*] Judge Magruder stated for the court of appeals, however, that, if the grounds for vacation of the district court's judgment were incorrect, the court of appeals agreed that no constitutional right was violated: "The full and satisfactory discussion * * * in the opinion of Judge Wyzanski below * * * needs no elaboration by us" (156 F. 2d at 292).

> question is whether a certain person can or cannot be entrusted with secret defence material. It would give a completely false atmosphere to the matter if it were assumed that reliability can somehow be put beyond doubt by meeting formal charges—or indeed, that reliability cannot be brought into doubt except on the basis of formal charges. Assessment of character may be the only consideration in some instances. That is not a matter of charges, or of trial or of proof. It is a matter of judgment.

While the political branch of the government has the undoubted power to afford a hearing before taking security measures, notwithstanding the nature of the issue to be determined, we question how the interest in such an "advisory" hearing can rise to constitutional dignity.

5. In summary, the need of military commanders for full control over access to their installations is especially clear; and this control has been exercised without substantial question throughout our history. Commanding officers, in allowing Mrs. Brawner and other employees of private contractors into military installations, convey no right of access in derogation of their absolute control. Rather, these employees are merely granted permission, subject to the ordinary prerogatives of the commanding officer, to enter the base for the convenience and benefit of the United States. In this case, these overriding prerogatives were embodied in the contract of the Gun Factory with the Concessionaire, by the provision preventing the Concessionaire from employing in the Gun Factory any employees not meeting the naval installation's

security requirements or other regulations of the Security Officer (R. 6). The Union's collective bargaining agreement and Mrs. Brawner's employment with the Concessionaire were necessarily subject to this contract with the employer.

C. THE INTEREST IN REPUTATION INJURED BY REFUSAL TO ADMIT A PERSON TO A MILITARY BASE IS NOT INDEPENDENTLY ENTITLED TO CONSTITUTIONAL PROTECTION

We have reserved for separate consideration the claim by petitioners (Pet. Br. 92) that a refusal to admit Mrs. Brawner to the base not only caused her to lose her job but also seriously damaged her reputation. It is our view that, if the interest Mrs. Brawner has in being able to work on a military base is not otherwise entitled to constitutional protection, it is not made so because of the consequential effect such inability may have upon her reputation and that, in any event, restoration of access to the base is not a proper remedy for an injury to reputation as such.

The suggestion that Mrs. Brawner's interest in not having her reputation injured by denial of access to the base is independently entitled to protection must rest largely (although these cases are not cited by petitioners in this regard) on *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, and *Harmon* v. *Brucker*, 355 U.S. 579. Those cases, however, were very different. In *Joint Anti-Fascist*, the action was, in effect, one to enjoin continuing publication of an alleged libel—*i.e.*, a listing of the organization on the Attorney General's list of subversive organizations. The determination and listing were separate and independent acts unrelated to any action being taken

against the organization itself (the list was to be used in passing upon the qualification of members of the organization for government employment). The publication of the assertion that the organization was in fact "subversive" was libelous *per se*, if untrue, and would clearly have been actionable if made by a private party.

In *Harmon* (not a constitutional case in any event) the action taken—the granting of a less-than-honorable discharge from the Army on the basis of pre-service activity—was a gratuitous labelling unrelated to any other action being taken. The case would have been different had Harmon sought to prevent his discharge from the service, but Harmon, far from objecting to the discharge, conceded that the Army had an absolute right to discharge him for any reason it considered to be in the national interest. His sole complaint, for which this Court gave relief, was that he had a statutory right to receive a certificate of discharge reflecting solely the character of his service.

In this case, however, the government has taken no action beyond the minimum necessary to prevent petitioner Brawner's access to the military base. The government's action was not published in any way except by informing the interested parties, Mrs. Brawner herself, the Concessionaire, and the Union, that she was no longer entitled to enter the base because of "security reasons" (R. 41, 98–99). Security Officer Williams first disclosed that Mrs. Brawner was being denied access for "security reasons" when he was asked by the supervisor of the Concessionaire's cafeterias at the Gun Factory for the reason why her

badge was being withdrawn (R. 98). Similarly, the supervisor did not tell Mrs. Brawner that the badge was being withdrawn for "security reasons" until she asked the reason for this action (R. 41). Admiral Tyree wrote the Union that Mrs. Brawner's badge was revoked because she failed to meet the "security requirements" of the base after the Union had inquired of him as to the basis for the Gun Factory's action (R. 31–32).

The description of the basis for the Gun Factory's action as "security reasons" was necessary to bring the action within the contract between the Concessionaire and the Gun Factory. The latter provided that the Concessionaire agreed not to continue to employ personnel who "fail to meet the security requirements" of the base. Thus, there has been no gratuitous labelling and no characterization has been attributed to petitioner Brawner beyond that inherent in the action itself. If she has been prejudiced, it is only by the fact that she cannot enter a military base. The further publication of Mrs. Brawner's loss of her badge and of the reasons for that action resulted only upon petitioners' election to start this litigation.

In addition, the action of denying Mrs. Brawner access to the base does not imply a determination of fact, as in the *Joint Anti-Fascist* case, that she was disloyal or subversive. The term "security reasons" includes a multitude of reasons, other than disloyalty, relating to possible interference with the military mission of the base, including being accident prone, dishonest, lawless, careless, garrulous, unreliable, overinquisitive or an alcoholic (see Naval Physi-

cal Security Manual, Sections 0156.3, 0250, 0260–0261, *infra,* pp. 99–100). There is no more basis in this record for inferring that the security reason involved here was information connecting petitioner Brawner with Communism than any of the other possible reasons, except that petitioners themselves suggest that the former was in fact the ground (Pet. Br. 10–11). But even if their supposition is correct, the public has not been informed that this is the reason, at least by the government. Furthermore, if the action was in fact taken because of some connection of Mrs. Brawner with Communism, the government's action implies no more than a *doubt* of her reliability—a doubt consistent with the likelihood, though not sufficiently certain to justify allowing her on a military base where important and secret work is in progress, that she is *in fact* loyal. Cf. *Beilan* v. *Board of Education,* 357 U.S. 399, 409–411 (Frankfurter, J., concurring); *Lerner* v. *Casey,* 357 U.S. 468, 478.

It might be argued that the public does not make such distinctions and that the denial of access to a military base for "security reasons" in practical effect operates as a "badge of infamy." We are not at all sure that this is true for persons in occupations like Mrs. Brawner's which the public does not connect with military secrets. But, even if this contention were correct, we submit that legitimate governmental activities cannot be restrained because of such consequential effects. If the interest in working on a military base is itself the kind of interest requir-

ing constitutional procedural protection, the practical consequences of the action taken, including the damage to reputation, may no doubt be considered in balancing the fairness of the procedures provided. But if the interest directly acted upon (access to a military base) is not so protected, so that the official action in denying access is lawful and privileged, it cannot be deemed unlawful because of the consequential damage to reputation.

Our point is not that an injury to reputation may not be weighed in formulating the ultimate judgment whether to recognize a person's interest in working on a military base as a constitutionally-protected interest in "property" or "liberty," but that it does not form an independent basis for granting the relief sought. The distinction can be more clearly seen in the case of dismissals from government employment, where the action may be taken on other than security grounds. In the context of government employment, we have contended that, since employees may constitutionally be dismissed on other grounds which involve injury to reputation without a hearing (see the cases cited *supra*, p. 74), they may also be dismissed on security grounds without a hearing. Similarly, since persons may be denied access to military bases for reasons other than security grounds without a hearing, they may be denied access on security grounds by the very same method. A reflection on reputation would justify, not reinstatement of petitioner Brawner's badge (which must depend upon an independent right to enter the naval base as

such), but at most the recognition of a cause of action for damages.[45]

As we have emphasized, the fundamental issue in this case is that of the separation of powers: Whether the traditionally plenary power of the executive to control entrance to military bases in the course of executive operations, and to determine with whom and on what terms it will deal in its proprietary capacity, can, or should be, subjected to judicial control. As we have framed the constitutional issue, it is whether the interest one has in being permitted by the government to have access to a military base amounts to "liberty" or "property" within the meaning of the Fifth Amendment. Stating the issue in those terms, and analyzing it in terms of the nature of the interests affected and not simply in terms of the substantiality of the impact of the government's action upon the individual, is, we believe, required by the history of the due process clause. We have also

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[45] We do not suggest that there has been consent to suit on any such cause of action. Cf. *Dupree* v. *United States*, 247 F. 2d 819 (C.A. 3); *Dupree* v. *United States*, 141 F. Supp. 773 (C. Cls.); 28 U.S.C. 2680(h).

tried to show that the position advocated by petitioners in this case—the application of procedural due process requirements to action of the government in its proprietary capacity as governor of its military posts, not affecting any recognized legal interests—requires a very significant and unhistorical extension of the role of the courts in supervising the activities of government. For over a century and a half the executive has borne the complete responsibility for determining who will be allowed to enter military bases, accountable to the electorate (as well as in large measure to Congress) for the inadequacy or the excessiveness with which this responsibility may be exercised.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

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Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General.

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JANUARY 1961.

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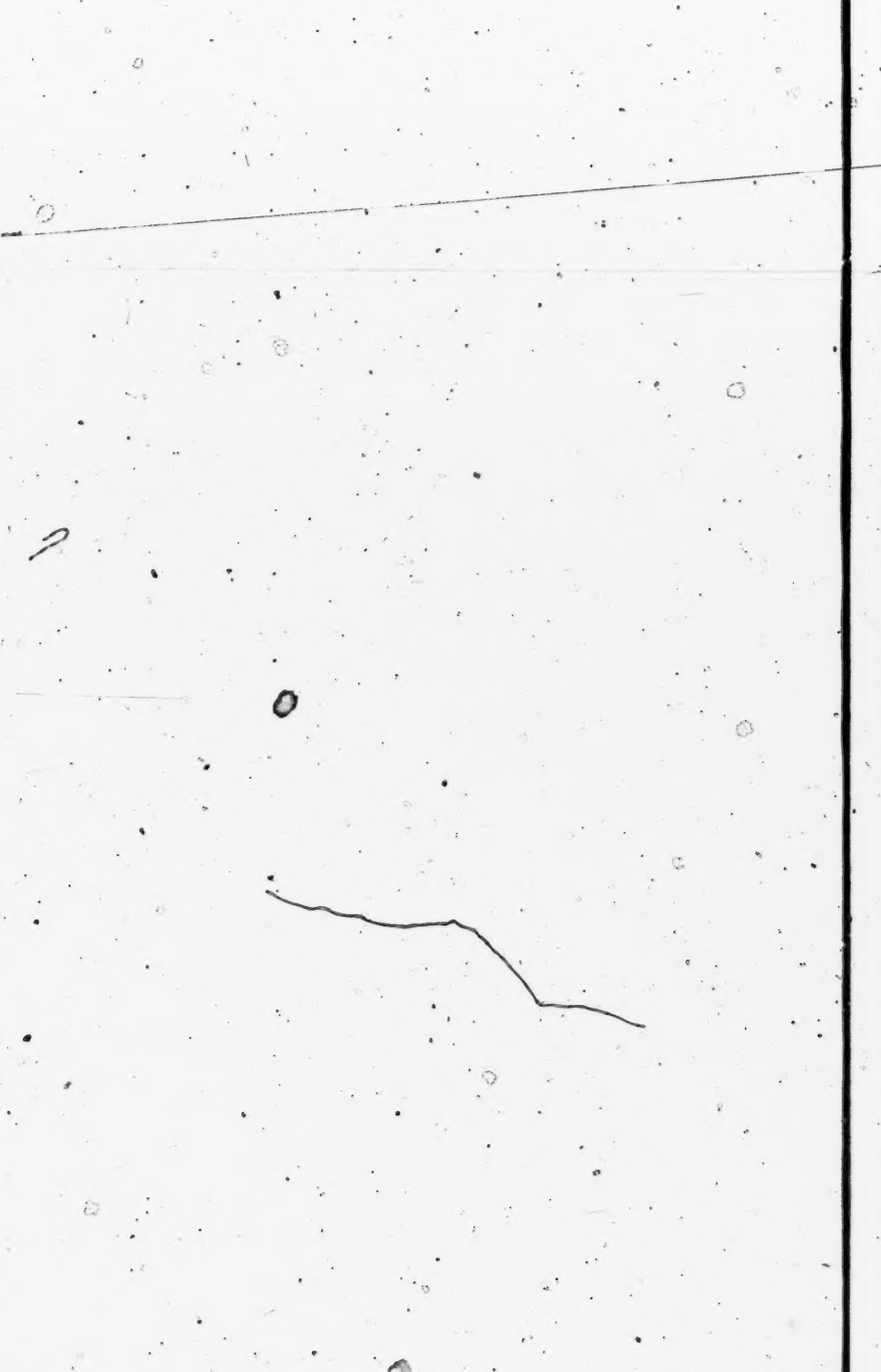

APPENDIX

5 U.S.C. 22:

Departmental Regulations; withholding of information from public not authorized.

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. * * *.

10 U.S.C. 5031:

Secretary of the Navy: responsibilities; compensation.

(a) There is a Secretary of the Navy, who is the head of the Department of the Navy. He shall administer the Department of the Navy under the direction, authority, and control of the Secretary of Defense.

* * * * *

(c) The Secretary of the Navy has custody and charge of all books, records, and other property of the Department.

10 U.S.C. 6011:

Navy Regulations.

United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President.

18 U.S.C. 1382:

Entering military, naval, or Coast Guard property.

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—

Shall be fined not more than $500 or imprisoned not more than six months, or both.

United States Navy Regulations, August 9, 1948:

THE SECRETARY OF THE NAVY, WASHINGTON,
9 August 1948.

The following Regulations are issued in accordance with the provisions of section 1547 of the Revised Statutes of the United States, for the government of all persons in the Naval Establishment.

All regulations, orders, and instructions inconsistent therewith are hereby revoked.

/s/ JOHN L. SULLIVAN

THE WHITE HOUSE, *9 August, 1948.*
Approved:

/s/ HARRY S. TRUMAN.

Article 0701. RESPONSIBILITY OF THE COMMANDING OFFICER

1. The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his responsibility, subject to the limitations prescribed by law and these regulations. While he may, at his discretion, and when not contrary to law or regulations, delegate authority to his subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of his continued responsibility for the safety, well-being, and efficiency of his entire command. * * *

Article 0704. EFFECTIVENESS FOR SERVICE

The commanding officer shall:

1. Exert every effort to maintain his command in a state of maximum effectiveness for war service consistent with the degree of readiness prescribed by proper authority. * * *

Article 0733. RULES FOR VISITS

1. Commanding officers are responsible for the control of visitors to activities of the Department of the Navy and shall comply with the relevant provisions of the U.S. Navy Security Manual for Classified Matter and other pertinent directives.

2. Commanding officers shall take such measures and impose any restrictions on visitors as necessary to safeguard the classified matter under their jurisdiction. * * *

Article 0734 DEALERS, TRADESMEN, AND AGENTS

In general, dealers or tradesmen or their agents shall not be admitted within a com-

mand, except as authorized by the commanding officer:

1. To conduct public business
2. To transact specific private business with individuals at the request of the latter
3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command.

Article 1502. CONTROL OF CLASSIFIED MATTER

The Chief of Naval Operations shall supplement these regulations with detailed instructions to insure the proper control of classified matter. Such instructions shall include the United States Navy Security Manual for Classified Matter, Registered Publication Manual, Communication Instructions, Armed Forces Industrial Security Regulation and such others as may from time to time be issued. All such publications shall have the full force and effect of these Regulations.

United States Navy Security Manual for Classified Matter (October 2, 1954):

CHAPTER 14—VISITOR CONTROL

Articles 1401–1404 and Article 1409 are printed at R. 116–119.

* * * * *

1411. ESCORTING VISITORS

All visitors, except members of the United States Armed Services who have been properly cleared, shall be escorted. "Escorts" are responsible to commanding officers to assure that the visitor has access to only that information for which he has been authorized. When available, escorts shall be members of the naval

service. If a member of the naval service is not available, a competent employee of the Naval Establishment may be designated.

* * * * *

CHAPTER 15*

PERSONNEL SECURITY INVESTIGATIONS AND CLEARANCES FOR ACCESS TO CLASSIFIED MATTER

Section 1

PERSONNEL SECURITY INVESTIGATIONS

1501. RESPONSIBILITY

1. The Chief of Naval Operations (Director of Naval Intelligence), when requested by competent authority, shall be responsible for conducting security investigations of the following:

a. Military and civilian personnel of the Naval Establishment.

b. Private contractors and contractors' employees requiring access to classified matter. (Refer to the Armed Forces Industrial Security Regulations, OPNAV Instruction 5540.8.)

* * * * *

United States Navy Security Manual for Classified Information (March 10, 1958):

SECTION 1—GENERAL

1401. RESPONSIBILITY

* * * * *

*The provisions of this chapter relate only to the investigative and clearance requirements for access to classified matter and have no bearing on the investigative requirements for employment of civilian personnel within the Naval Establishment or the acceptance of personnel for the naval service. Requirements relating thereto are contained in appropriate instructions issued by the Bureau of Naval Personnel, the Office of Industrial Relations, Commandant of the Marine Corps, or higher authority.

2. Persons in a command status shall be responsible for the security control of visitors within the limits of their jurisdiction. They shall promulgate such additional directives as are necessary for the control of visitors within their respective commands.

1402. VISITORS

The term "visitors" as used herein for security purposes applies as follows:

1. A visitor on board a ship or aircraft is any person who is not a member of the ship's company or not a member of a staff using the ship as a flagship.

2. A visitor to a naval shore establishment is any person who is not attached to or employed by the command or staff using that station as headquarters.

1403. CATEGORIES OF VISITORS

Persons who are considered visitors as described in article 1402 are divided into three basic categories which are further subdivided as follows:

Category One—United States citizens and immigrant aliens, except those representing a foreign government or a foreign private interest.

Alfa—Personnel of the Executive Branch of the Government involved in day to day working relations with members of the activity of the Naval Establishment to be visited and personally known to them.

Bravo—Other Department of Defense and United States Coast Guard personnel.

Charlie—Personnel of private facilities under contract to the Department of Defense.

Delta—Other employees of the Executive Branch of the Government.

Category Two—United States citizens and immigrant aliens not described in Category One.

Alfa—Representatives of a foreign government or military service.

Bravo—Representatives of a foreign private interest.

Charlie—Other United States citizens and immigrant aliens.

Category Three—Foreign nationals (including foreigners in the United States on nonimmigration visas).

Alfa—Representatives of a foreign government or military service.

Bravo—Representatives of a foreign private interest.

Charlie—Foreign nationals in the United States sponsored by a military department, or other foreign nationals employed on military projects, either as contractor's employees or departmental employees.

Delta—Other Foreign nationals.

1404. RESPONSIBILITIES OF THE COMMAND BEING VISITED

1. The commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted. * * *

1407. VISITOR CONTROL AND ESCORT

In order to protect the classified information under his jurisdiction the commanding officer shall cause the movements of all visitors to be restricted as he may deem necessary. When escorts are utilized, they are responsible to the commanding officer to ensure that the visitor has access only to that information which he has been authorized to receive. Escorts may be either military or civilian members of the Naval Establishment.

SECTION 2—UNCLASSIFIED VISITS

1408. GENERAL

1. Visits to activities of the Naval Establishment by persons who will not have access to classified information do not require authoriza-

tion from the Chief of Naval Operations (Director of Naval Intelligence). The commanding officer concerned is responsible for the conditions under which such visits are permitted, provided, however, that all visitors in categories Two Alfa and Bravo, and Three, shall be accompanied by a competent escort (refer to article 1407), except during general visiting (see article 1409).

* * * * *

SECTION 3—CLASSIFIED VISITS

1414. VISIT CLEARANCES

1. Visits to activities of the Naval Establishment by persons who will have access to classified information shall be processed in accordance with the requirements of Table C and article 1415 below. A visitor will be considered to have "access" to classified information when he is permitted to gain knowledge of such information through observation or discussion. This term is also interpreted to mean that a visitor will have access when classified information is exposed in such a manner in the space being visited, or en route to the space to be visited, that he will gain knowledge through observation alone.

* * * * *

United States Navy Physical Security Manual (April 14, 1956):

0154. THE COMMANDING OFFICER. The Commanding Officer is responsible for the security of all property and installations within his command. He prescribes the security measures to be adopted, and coordinates when necessary, the measures adopted by subordinates, but he alone remains responsible for the overall security of his command.

0156. THE SECURITY OFFICER. Normally, the Commanding Officer delegates most of the ad-

ministrative and operational aspects of security to a subordinate, who is referred to in this manual as the Security Officer. The functions of this officer include planning, supervision, inspection, coordination, and submission of recommendations with respect to:

a. Physical security
   (1) Internal security
   (2) External security
   (3) Physical protection
   (4) Guard ceilings

b. Liaison with security and safety agencies.

0156.3. SPECIFIC DUTIES. The planning, supervision and coordination of matters relating to the security of the command includes:

a. *Internal security matters:*

(1) Safeguarding from espionage and sabotage and the unauthorized disclosure of classified matter.

(2) Safeguarding from any incident which might jeopardize the normal activity of the command such as theft, robbery, riot, lawlessness, etc.

(3) Coordination of fire protection agencies and station fire departments with the law enforcement agencies and guard force.

0250. SECURITY HAZARDS

* * * * *

After the critical and/or vulnerable portions of the activity or facility within the activity have been decided upon, the command must determine the probability of damage to the activity or facility from:

a. Hazards inherent in daily operations such as accidents.
b. Espionage.
c. Sabotage.

These hazards have been listed in the order in which they are most likely to occur.

0260. HAZARDS INHERENT IN DAILY OPERATIONS

A security program is not confined to meeting the most hazardous situations.

It is a continuing program beginning in peace time and expanding to meet the particular hazards of formal hostilities. Increased operation naturally intensifies routine hazards. Specific hazards within any activity depend on such variables as the type of activity, activity layout, the effectiveness of the organized security program, location, topography, etc.

0261. ACCIDENTS. Accidents in whatever form, whether they result in damage to equipment and/or material, or to loss of life or limb are security hazards. In whatever degree they occur, accidents will inevitably impede the effectiveness of the command to insure uninterrupted maximum continuation of its mission. A well organized accident prevention program is the only means by which this hazard to security can be minimized.

0540. VISITOR IDENTIFICATION AND CONTROL SYSTEM

For the purpose of this manual, the term "visitor," in addition to its normal connotation, is defined as including employees and others who require infrequent access to security areas or one to whom permanent employee-type identification for such areas has not been issued.

0542. CONTRACTORS. Contractor's employees performing work in a security area should be provided with and be required to wear a distinctive badge. There are three general types of contractor's employees:

a. Employees on substantial or construction projects requiring a considerable period to complete. The contract work area should be isolated by means of a fence or other effective barrier. When possible, contractor's employees should enter the work area directly with-

it entering the security area. Where it is ecessary for the contractor's employees to ter a security area to reach the work area, e guard force personnel should insure that e contractor's personnel go directly to the ork area without loitering or straying with- the security area. If the work area is segre- ted, and abutting security areas or portions abutting security areas are properly arded, contractor's employees should wear stinctive badges and their loyalty should be uched for by their employer.

b. Employees performing work at regular or regular intervals and for a short working eriod within a security area should be handled the same procedure adopted for the control visitors.

c. Employees performing continuous service r the activity within a security area should handled by the same procedure adopted for gular activity personnel.

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ent portions of the agreement of December , between the Board of Governors of the n Factory and M & M Restaurants, Inc., the naire:

TICLE IX. PROVISION FOR YARD SECURITY AND REGULATIONS

* * * * *

(b) Approval for the employment of any rson by the Concessionaire to work in the val Gun Factory, in connection with the op- tion of the cafeterias and food services cov- d by this agreement, shall be conditioned n the right of the Superintendent, or his y designated representative, to cancel, re- e or withdraw the same for any cause or son deemed sufficient by the Superintendent, his representative, in the exercise of discre- n, without the necessity for any showing of

cause. Upon notice of the cancellation, revocation or withdrawal of the approval for the employment of any person, the Concessionaire shall immediately terminate the employment of such person, his or her identification badge shall be taken up, and such person shall not thereafter be allowed in the Naval Gun Factory or perform any duties in connection with the cafeterias and food services covered by this agreement.

(c) The Concessionaire undertakes and agrees that all employees shall accept, agree to comply with and be bound by the "Regulations of the Naval Gun Factory" as now existing or hereafter amended, supplemented or superseded; and that notice of this provision shall be given each employee, and acquiescence therein shall be obtained from him or her, immediately upon employment.

* U.S. GOVERNMENT PRINTING OFFICE: 1980